

man, regulates the industrial relations, exercises control over the production, manufacture and distribution of essential commodities, starts many enterprises, tries to achieve equality for all and ensures equal pay for equal work. It improves slums, looks after the health and morals of the people, provides education to children and takes all the steps which social justice demands. All these developments have widened the scope and ambit of administrative law.¹

2. DEFINITION OF ADMINISTRATIVE LAW

It is indeed difficult to evolve a scientific, precise and satisfactory definition of Administrative Law. Many jurists have made attempts to define it, but none of the definitions has completely demarcated the nature, scope and content of administrative law. Either the definitions are too broad and include much more than necessary or they are too narrow and do not include all the necessary ingredients. The literature on Administrative Law presents the reader with considerable diversity of opinion. For some it is the law relating to the control of powers of the government. The main object of this law is to protect individual rights. Others place greater emphasis upon rules which are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others see the principal objective of Administrative Law as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process.²

Ivor Jennings

Administrative Law is the law relating to the administration. It determines the organisation, powers and duties of the administrative authorities.³

This is the most widely-accepted definition. But according to Griffith and Street⁴, there are two difficulties:

- (i) It does not distinguish administrative law from constitutional law; and
- (ii) It is a very wide definition, for the law which determines the powers and functions of administrative authorities may also deal with the substantive aspects of such powers, for example, legislations relating to public health services, houses, town and

1. *U.P. Warehousing Corpn. v. Vajpayee*, (1980) 3 SCC 459 (468-69): AIR 1980 SC 840 (846): (1980) 2 SCR 773.

2. Craig: *Administrative Law*, 1993, p. 3.

3. *The Law and the Constitution*, 1959, p. 217.

4. *Principles of Administrative Law*, 1967, p. 3.

country planning, etc.; but these are not included within the scope and ambit of administrative law.

Again, it does not include the remedies available to an aggrieved person when his rights are adversely affected by the administration.

Wade

According to Wade, Administrative Law is 'the law relating to the control of governmental power'.⁵ According to him, the primary object of Administrative Law is to keep powers of the Government within their legal bounds so as to protect the citizens against their abuse.

Undoubtedly, this definition places considerable emphasis on the object of Administrative Law by touching the 'heart of the subject'. It does not, however, define the subject. It also does not deal with the powers and duties of administrative authorities nor with the procedure required to be followed by them.

K.C. Davis

"Administrative Law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."⁶

In one respect, this definition is proper as it puts emphasis on *procedure* followed by administrative agencies in exercising their powers. However, it does not include the substantive laws prepared by these agencies. According to Davis, an administrative agency is a governmental authority, other than a court and a legislature which affects the rights of private parties either through administrative adjudication or rule-making. The difficulty in accepting this definition is that it does not include many non-adjudicative and yet administrative functions of the administration which cannot be characterised as legislative or quasi-judicial. Another difficulty with this definition is that it puts an emphasis on the control of the administrative functions by the judiciary, but does not study other equally important controls, e.g. parliamentary control of delegated legislation, control through administrative appeals and revisions and the like.

Garner

Garner also adopts the American approach advocated by K.C. Davis. According to him, Administrative Law may be described as "those rules which are recognised by the courts as law and which relate to and regulate the administration of Government".⁷

5. *Administrative Law*, 1994, p. 4.

6. *Administrative Law Text*, 1959, p. 1.

7. *Administrative Law*, 1985, p. 4.

Griffith and Street

According to Griffith and Street⁸, the main object of administrative law is the operation and control of administrative authorities. It must deal with the following three aspects:

- (1) What sort of power does the administration exercise ?
- (2) What are the limits of those powers ?
- (3) What are the ways in which the Administration is kept within those limits ?

According to the Indian Law Institute⁹, the following two aspects must be added to have a complete idea of present-day administrative law:

- (4) What are the procedures followed by the administrative authorities ?
- (5) What are the remedies available to a person affected by administration ?

M.P. Jain

“Administrative Law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.”¹⁰

Administrative Law, according to this definition, deals with four aspects. Firstly, it deals with composition and the powers of administrative authorities. Secondly, it fixes the limits of the powers of those authorities. Thirdly, it prescribes the procedure to be followed by these authorities in exercising such powers. And fourthly, it controls these administrative authorities through judicial and other means.

Author

Taking into account the ambit and scope, I venture to define Administrative Law thus:

“Administrative Law is that branch of Constitutional Law which deals with powers and duties of administrative authorities, the procedure followed by them in exercising the powers and discharging the duties and the remedies available to an aggrieved person when his rights are affected by any action of such authorities.”

8. *Principles of Administrative Law*, 1967, p. 3.

9. *Cases and Materials on Administrative Law in India*, 1966, Vol. I, p. 53.

10. *Treatise on Administrative Law*, 1996, Vol. I, p. 13.

3. NATURE AND SCOPE OF ADMINISTRATIVE LAW

Administrative Law deals with the powers of the administrative authorities, the manner in which the powers are exercised and the remedies which are available to the aggrieved persons, when those powers are abused by these authorities. As discussed above, the administrative process has come to stay and it has to be accepted as a necessary evil in all progressive societies, particularly in a welfare State, where many schemes for the progress of society are prepared and administered by the Government. The execution and implementation of this programme may adversely affect the rights of citizens. The actual problem is to reconcile social welfare with the rights of individual subjects. As has been rightly observed by Lord Denning:¹¹ "Properly exercised, the new powers of the executive lead to the Welfare State; but abused they lead to the Totalitarian State." The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.¹²

4. REASONS FOR GROWTH OF ADMINISTRATIVE LAW

The following factors are responsible for the rapid growth and development of administrative law:

- (1) There is a radical change in the philosophy as to the role played by the State. The negative policy of maintaining 'law and order' and of '*laissez faire*' is given up. The State has not confined its scope to the traditional and minimum functions of defence and administration of justice, but has adopted the positive policy and as a welfare State has undertaken to perform varied functions.
- (2) The judicial system proved inadequate to decide and settle all types of disputes. It was slow, costly, inexpert, complex and formalistic. It was already overburdened, and it was not possible to expect speedy disposal of even very important matters, e.g. disputes between employers and employees, lock-outs, strikes, etc. These burning problems could not be solved merely by literally interpreting the provisions of any statute, but required consideration of various other factors and it could not be done by the ordinary courts of law. Therefore, industrial tribunals and labour courts were established, which possessed the techniques and expertise to handle these complex problems.

11. *Freedom under the Law*, 1949, p. 126.

12. For detailed discussion see C.K. Thakker: *Administrative Law*, 1996, pp. 4-7.

- (3) The legislative process was also inadequate. It had no time and technique to deal with all the details. It was impossible for it to lay down detailed rules and procedures, and even when detailed provisions were made by the legislature, they were found to be defective and inadequate, e.g., rate fixing. And, therefore, it was felt necessary to delegate some powers to the administrative authorities.
- (4) There is scope for experiments in administrative process. Here, unlike legislation, it is not necessary to continue a rule until commencement of the next session of the legislature. Here a rule can be made, tried for some time and if it is found defective, it can be altered or modified within a short period. Thus, legislation is rigid in character while the administrative process is flexible.
- (5) The administrative authorities can avoid technicalities. Administrative law represents functional rather than a theoretical and legalistic approach. The traditional judiciary is conservative, rigid and technical. It is not possible for the courts to decide the cases without formality and technicality. The administrative tribunals are not bound by the rules of evidence and procedure and they can take a practical view of the matter to decide complex problems.
- (6) Administrative authorities can take preventive measures, e.g. licensing, rate fixing, etc. Unlike regular courts of law, they have not to wait for parties to come before them with disputes. In many cases, these preventive actions may prove to be more effective and useful than punishing a person after he has committed a breach of any provision of law. As Freeman says, "Inspection and grading of meat answers the consumer's need more adequately than does a right to sue the seller after the consumer is injured."¹³
- (7) Administrative authorities can take effective steps for enforcement of the aforesaid preventive measures; e.g. suspension, revocation and cancellation of licences, destruction of contaminated articles, etc. which are not generally available through regular courts of law.

13. Cited in *Cases and Materials on Administrative Law in India*, 1966, Vol. I, pp. 3-4.

5. HISTORICAL GROWTH AND DEVELOPMENT OF ADMINISTRATIVE LAW

(A) England

In England, by and large, the existence of Administrative Law as a separate branch of law was not accepted until the advent of the 20th century. In 1885, Dicey in his famous thesis on rule of law observed that there was no Administrative Law in England. He had pronounced to Robson: "In England, we know nothing of Administrative Law and we wish to know nothing about it."¹⁴ But while saying this, he ignored the existence of administrative discretion and administrative justice which were current even in his days. In a large number of statutes discretionary powers were conferred on the executive authorities and administrative tribunals which could not be called into question by the ordinary courts of law. But he disregarded them altogether. It appears that his contemporary Maitland was quite conscious of the true position and he observed in 1887: "If you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half of the cases reported have to do with rules of administrative law."¹⁵

In 1914, however, Dicey changed his views. In the last edition of his famous book '*Law and the Constitution*', published in 1915, he admitted that during the last thirty years, due to increase of duties and authority of English officials, some elements of *droit* had entered into the law of England. But even then, he did not concede that there was administrative law in England. However, after two decisions of the House of Lords in *Board of Education v. Rice*¹⁶ and *Local Govt. Board v. Arlidge*¹⁷, in his article "The Development of Administrative Law in England"¹⁸ he observed: "Legislation had conferred a considerable amount of quasi-judicial authority on the administration which was a considerable step towards the introduction of administrative law in England."

According to Friedmann¹⁹, unfortunately, Dicey misunderstood the scope and ambit of administrative law. He thought administrative law to be inconsistent with the maintenance of the rule of law. Hence, while studying the rule of law, he excluded altogether administrative law and a special system of administrative courts.

14. Robson: *Administrative Law in England*, pp. 85-86.

15. Maitland: *The Constitutional History of England*, 1908, p. 505.

16. 1911 AC 179; 80 LJBK 496; 104 LT 689.

17. 1915 AC 120; 84 LJBK 72; 111 LT 905.

18. (1915) 31 LQR 148.

19. *American Administrative Law*, 1962, p. 21.

As observed by Griffith and Street²⁰, the study of administrative law had to suffer a lot because of Dicey's conservative approach. Of course, in due course, scholars made conscious efforts to know the real position. But even to them, the study of administrative law was restricted only to two aspects, viz. delegated legislation and administrative adjudication. Even in 1935, Lord Hewart, Chief Justice of England described the term 'Administrative Law' as 'continental jargon'.

In 1929, the Committee on Minister's Powers headed by Lord Donoughmore was appointed by the British Government to examine the problems of delegated legislation and the judicial and quasi-judicial powers exercised by the officers appointed by the ministers and to suggest effective steps and suitable safeguards to ensure the supremacy of the rule of law.

In 1932, the Donoughmore Committee submitted its report and made certain recommendations with regard to better publication and control of subordinate legislation, which were accepted by Parliament with the passage of the Statutory Instruments Act, 1946. In 1947, the Crown Proceedings Act was passed by the British Parliament which made the Government liable to pay damages in cases of tortious and contractual liability of the Crown. Thus, the abandonment of the famous doctrine "The King can do no wrong" considerably expanded the scope of administrative law in England. In 1958, the Tribunals and Inquiries Act was passed for the purpose of better control and supervision of administrative decisions, and the decisions of the administrative authorities and tribunals were made subject to appeal and supervisory jurisdiction of the regular courts of law.

(B) U.S.A.

Administrative Law was in existence in America in the 18th century, when the first federal administrative law was embodied in the statute in 1789, but it grew rapidly with the passing of the Inter-State Commerce Act, 1877. In 1893, Frank Goodnow published a book on '*Comparative Administrative Law*' and in 1905, another book on the '*Principles of Administrative Law of the United States*' was published. In 1911, Ernst Freund's '*Case-Book on Administrative Law*' was published. The Bench and the Bar also took interest in the study of administrative law. In his address to the American Bar Association in 1946, President Elihu Root warned the country by saying: "There is one special field of law, development of which has manifestly become inevitable. We are entering

20. *Principles of Administrative Law*, 1963, p. 3; see also Lord Hewart: *Not Without Prejudice*, 1935, p. 96.

upon the creation of a body of administrative law, quite different in its machinery, its remedies and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts.... If we are to continue a Government of limited powers, these agencies of regulation must themselves be regulated....' Unfortunately, this advice of a wise counsel was ignored by the leaders of the Bar. The powers of the administrative bodies continued to increase day by day and they became a 'Fourth Branch' of the Government.

After the New Deal, it was felt necessary to take effective steps in this field. A special committee was appointed in 1933 which called for greater judicial control over administrative agencies. After the report of Roscoe Pound Committee of 1938 and Attorney General's Committee in 1939, the Administrative Procedure Act, 1946 was passed which contained many provisions relating to the judicial control over administrative actions.

(C) France

French administrative law or *droit administratif* is a branch of law which deals with the powers and duties of various administrative agencies and officials. According to Dicey²¹, *droit administratif* is that portion of French law which determines (i) position and liabilities of State officials; (ii) rights and liabilities of private individuals in their dealings with officials as representatives of the State; and (iii) procedure by which these rights and duties are enforced. According to him, this system is based on two principles, namely, (1) an individual in his dealings with the State does not, according to the French legal system, stand on the same footing as that on which he stands in dealing with his neighbour; and (2) the Government and its officials are independent of and free from the jurisdiction of the ordinary civil courts.

From the above two principles, the following consequences ensue; (1) the relation of the Government and its officials towards private citizens must be regulated by a body of rules which may differ considerably from the laws which govern the relation of one private person to another; (2) the ordinary courts which determine disputes between private individuals have no jurisdiction to decide disputes between a private individual and the State but they are determined by administrative courts; (3) in case of conflict of jurisdiction between two sets of courts, the said dispute will be decided by the administrative court; and (4) *droit administratif* has a tendency to protect from the supervision or control of the

21. *Law and the Constitution*, 1915, p. 330. For detailed discussion of *droit administratif* see Lecture II (*infra*).

ordinary law courts any servant of the State who is guilty of an act, however illegal, whilst acting *bona fide* in obedience to the orders of his superiors and in the discharge of his official duties.

Dicey did not favour *droit administratif*. According to him, the object of two sets of courts and two types of laws is to protect Government officials from the consequences of their acts. According to him, there was no rule of law in France. In view of the fact that there was (1) supremacy of law, and (2) equality before the law, there was much more effective control over administrative action in England than in France.

However, as we will see, Dicey was not right in drawing certain inferences. As a matter of fact, *Conseil d'Etat* afforded much more protection to the aggrieved parties in France than regular courts afforded to such persons in England. The popular conception that in France, the State officials in their official dealings with private citizens are above the law, or are a law unto themselves, is erroneous. The official transgressing the bounds of law or acting contrary to the rules of natural justice in his dealings with the citizen is subject to a greater and more effective control in France than in some Anglo-Saxon countries.

(D) India

Administrative Law was in existence in India even in ancient times. Under the Mauryas and Guptas, several centuries before Christ, there was well-organised and centralised administration in India. The rule of *Dharma* was observed by the kings and administrators and nobody claimed any exemption from it. The basic principles of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by *Dharma*, which was even a wider word than 'Rule of Law' or 'Due process of Law'. Yet, there was no administrative law in existence in the sense in which we study it today.

With the establishment of the East India Company and the advent of the British Rule in India, the powers of the Government had increased. Many Acts, statutes and legislations were passed by the British Government, regulating public safety, health, morality, transport and labour relations. The practice of granting administrative licence began with the State Carriage Act, 1861. The first public corporation was established under the Bombay Port Trust Act, 1879. Delegated legislation was accepted by the Northern India Canal and Drainage Act, 1873 and the Opium Act, 1878. Proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives Act, 1884. In many statutes, provisions were made regarding holding of permits and

licences and for the settlement of disputes by the administrative authorities and tribunals.

During the Second World War, the executive powers tremendously increased. The Defence of India Act, 1939 and the Rules made thereunder conferred ample powers on the executive to interfere with life, liberty and property of an individual with little or no judicial control over them. In addition to this, the Government issued many orders and ordinances covering several matters by way of administrative instructions.

Since Independence, the activities and the functions of the Government have further increased. Under the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, the Factories Act, 1948 and the Employees' State Insurance Act, 1948, important social security measures have been taken for those employed in industries.

The philosophy of a welfare State has been specifically embodied in the Constitution of India. In the Constitution itself provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to subserve the common good. The operation of the economic system should not result in the concentration of wealth and means of production. For the implementation of all these objects the State is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the Constitution. In fact, to secure these objects, several steps have been taken by Parliament by passing many Acts, e.g. the Industrial (Development and Regulation) Act, 1951, the Requisitioning and Acquisition of Immovable Property Act, 1952, the Essential Commodities Act, 1955, the Companies Act, 1956, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, the Equal Remuneration Act, 1976, the Urban Land (Ceiling and Regulation) Act, 1976, the Beedi Workers' Welfare Fund Act, 1976, etc.

Markose studied the reported cases of the Supreme Court of three years (1953, 1954 and 1955) and found that about half of the cases dealt with matters of administrative law. Out of 250 reported cases, 119 belonged to administrative law category. Of 275 pages of Supreme Court judgments, 229 related to the subject of administrative law.²² Obviously, it has increased considerably thereafter.

22. *Administrative Law in India*, (1961), p. 257 cited by Fazal: *Judicial Control of Administrative Action in India, Pakistan and Bangladesh*, (1990), p. 9.

Even while interpreting all these Acts and the provisions of the Constitution, the judiciary started taking into consideration the objects and ideals of social welfare. Thus, in *Vellukunnel v. Reserve Bank of India*²³, the Supreme Court held that under the Banking Companies Act, 1949, the Reserve Bank was the sole judge to decide whether the affairs of a banking company were being conducted in a manner prejudicial to the depositors' interest and the Court had no option but to pass an order of winding up as prayed for by the Reserve Bank. Again, in *State of A.P. v. C.V. Rao*²⁴, dealing with a departmental inquiry, the Supreme Court held that the jurisdiction to issue a writ of *certiorari* under Article 226 is supervisory in nature. It is not an appellate court and if there is some evidence on record on which the tribunal had passed the order, the said findings cannot be challenged on the ground that the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal. In *M.P. Srivastava v. Suresh Singh*²⁵, the Supreme Court observed that in matters relating to questions regarding adequacy or sufficiency of training, the expert opinion of the Public Service Commission would be generally accepted by the Court. In *State of Gujarat v. M.I. Haider Bux*²⁶, the Supreme Court held that under the provisions of the Land Acquisition Act, 1894, ordinarily, the Government is the best authority to decide whether a particular purpose is a public purpose and whether the land can be acquired for that purpose or not.

Similarly, in *Maharashtra State Board of Education v. Paritosh*²⁷ also, the Supreme Court held that "the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them".

23. AIR 1962 SC 1371; (1962) Supp (3) SCR 632; see also *Peerless General Finance and Investment Comp. Ltd. v. Reserve Bank of India*, (1992) 2 SCC 343 (375); AIR 1992 SC 1033.

24. (1975) 2 SCC 557; AIR 1975 SC 2151; see also *K.L. Shinde v. State of Mysore*, (1976) 3 SCC 76; AIR 1976 SC 1080; *U.P. Warehousing Corpn. v. Vajpayee*, (1980) 3 SCC 459; AIR 1980 SC 840.

25. (1977) 1 SCC 627; AIR 1976 SC 1404; see also *Shyam Babu v. Union of India*, (1994) 2 SCC 521.

26. (1976) 3 SCC 536; AIR 1977 SC 594.

27. (1984) 4 SCC 27(56-57); AIR 1984 SC 1543(1559).

In *Javid Rasool v. State of J&K*²⁸, the Supreme Court observed that a member of the Selection Committee can ask even irrelevant questions to explore the candidates' capacity to detect irrelevancies.

Thus, on the one hand, the activities and powers of the Government and administrative authorities have increased and on the other hand, there is greater need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the Constitution. For that purpose, provisions are made in the statutes giving right of appeal, revision, etc. and at the same time extraordinary remedies are available to them under Articles 32, 226 and 227 of the Constitution of India. The principle of judicial review is also accepted in our Constitution and the orders passed by the administrative authorities can be quashed and set aside if they are *mala fide* or *ultra vires* the Act or the provisions of the Constitution. And if the rules, regulations or orders passed by these authorities are not within their powers, they can be declared *ultra vires*, unconstitutional, illegal or void.

6. CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

Sometimes, a question is asked as to whether there is any distinction between constitutional law and administrative law. Till recently, the subject of administrative law was dealt with and discussed in the books of constitutional law and no separate and independent treatment was given to it. In many definitions of administrative law, it was included in constitutional law. Though in essence constitutional law does not differ from administrative law inasmuch as both are concerned with functions of the Government and both are a part of public law in the modern State and the sources of both are the same, yet there is a distinction between the two. According to Maitland²⁹, while constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to administrative law. According to Hood Phillips:³⁰

“Constitutional law is concerned with the organisation and functions of Government *at rest* whilst administrative law is concerned with that organisation and those functions *in motion*.”

But the opinion of the English and American authors is that the distinction between constitutional law and administrative law is one of degree, convenience and custom rather than that of logic and principle.

28. (1984) 2 SCC 631(637): AIR 1984 SC 873(877).

29. *Constitutional History*, 1955, p. 526; see also Holland: *Jurisprudence*, 10th Edn., p. 506.

30. *Constitutional and Administrative Law*, 1962, p. 13; see also Garner: *Administrative Law*, 1963, pp. 1-2.

It is not essential and fundamental in character. Keith rightly remarks: "It is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial."³¹

India has a written Constitution. While constitutional law deals with the general principles relating to the organisation and power of the legislature, executive and judiciary and their functions *inter se* and towards the citizens, administrative law is that part of constitutional law which deals in detail with the powers and functions of the administrative authorities, including civil services, public departments, local authorities and other statutory bodies. Thus, while constitutional law is concerned with constitutional status of ministers and civil servants, administrative law is concerned with the organisation of the services and the proper working of various departments of the Government.

7. ENGLISH ADMINISTRATIVE LAW AND INDIAN ADMINISTRATIVE LAW

There is an important difference between English Administrative Law and Indian Administrative Law. In England, Parliament is supreme and sovereign. It can do everything, 'but make woman a man and a man a woman'. The Law enacted by the British Parliament is the highest form of law and prevails over every other form of law.³² Any administrative action, therefore, can be challenged there only if it is *ultra vires* the statute under which it was taken. In India, on the other hand, as there is a written Constitution and the power of judicial review is conferred by the Constitution on the Supreme Court and the High Courts, the same can be challenged as *ultra vires* the Constitution also. In India, administrative action will have to be tested on four anvils — (i) the action must have been taken in accordance with the Rules and Regulations; (ii) the Rules and Regulations should be in accordance with the relevant statute, i.e. the parent Act; and (iii) the action, the Rules and Regulations and the parent Act must be in consonance with the provisions of the Constitution; and (iv) if it is a constitutional amendment, such amendment of the Constitution should also be in conformity with the basic structure of the Constitution.

It is submitted that the following observations of Pathak, C.J.³³ lay down the correct law on the point and are worth quoting:

"The range of judicial review recognised in the superior judiciary in India is perhaps the widest and the most extensive known"

31. Basu: *Administrative Law*, 1996, p. 1.

32. *Cheney v. Conn.*, (1968) 1 All ER 779; (1968) 1 WLR 242.

33. *Union of India v. Raghubir Singh*, (1989) 2 SCC 754; AIR 1989 SC 1933.

to the world of law. The power extends to examining the validity of even an amendment to the Constitution, for now it has been repeatedly held that no constitutional amendment can be sustained which violates the basic structure of the Constitution.”³⁴

(emphasis supplied)

34. *Id.*, p. 766 (SCC): 1938 (AIR); see also *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299; *Minerva Mills Ltd. v. Union of India*, (1980) 2 SCC 591: AIR 1980 SC 1789.

Lecture II
Basic Constitutional Principles

No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go or send for him, except under a lawful judgment of his peers and by the law of the land.

—MAGNA CARTA

Englishmen are ruled by the law, and by the law alone; a man with us may be punished for a breach of law, but can be punished for nothing else.

—DICEY

The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.

—MADISON

SYNOPSIS

1. Rule of Law
 - (A) General
 - (B) Meaning
 - (i) Supremacy of law
 - (ii) Equality before law
 - (iii) Predominance of legal spirit
 - (C) Application of doctrine
 - (D) Comments
 - (E) Importance
 - (F) Droit Administratif
 - (i) Meaning
 - (ii) Comments
 - (iii) Concrete cases
 - (G) Modern concept of Rule of Law
 - (H) Rule of Law under Constitution of India
 - (I) Habeas Corpus case
2. Separation of Powers
 - (A) General
 - (B) Meaning
 - (C) Historical background
 - (D) Montesquieu's doctrine
 - (E) Effect
 - (F) Defects
 - (G) Importance
 - (H) Separation of Powers in practice
 - (i) U.S.A.

- (ii) England
- (iii) India

1. RULE OF LAW

(A) General

One of the basic principles of the English Constitution is the Rule of Law. This doctrine is accepted in the Constitution of U.S.A. and also in the Constitution of India. The entire basis of Administrative Law is the doctrine of the rule of law. Sir Edward Coke, the Chief Justice in James I's reign was the originator of this concept. In a battle against the King, he maintained successfully that the King should be under God and the Law, and he established the supremacy of the Law against the executive. Dicey developed this theory of Coke in his classic book '*The Law and the Constitution*' published in the year 1885.

(B) Meaning

According to Dicey, the rule of law is one of the fundamental principles of the English Legal System. In the aforesaid book he attributed the following three meanings to the said doctrine:

- (i) Supremacy of law;
- (ii) Equality before law; and
- (iii) Predominance of legal spirit.

(i) *Supremacy of law*

Explaining the first principle, Dicey states that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. It excludes the existence of arbitrariness, of prerogative or even wide discretionary authority on the part of the Government. According to him the Englishmen were ruled by the law and law alone. A man may be punished for a breach of law, but can be punished for nothing else.¹ In his words, "Wherever there is discretion, there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority on the part of the Government must mean insecurity for legal freedom on the part of its subjects."² As Wade³ says the rule of law requires that the Government should be subject to the law, rather than the law subject to the Government.

In other words, according to this doctrine, no man can be arrested, punished or be lawfully made to suffer in body or goods except by due

1. *The Law and the Constitution*, 1915, p. 202.

2. *Id.*, p. 184.

3. *Administrative Law*, 1994, pp. 34-36.

process of law and for a breach of law established in the ordinary legal manner before the ordinary courts of the land. Dicey described this principle as 'the central and most characteristic feature' of Common Law.

(ii) Equality before law

Explaining the second principle of the rule of law, Dicey states that there must be equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. According to him, in England, all persons were subject to one and the same law, and there were no extraordinary tribunals or special courts for officers of the Government and other authorities. He criticised the French legal system of *droit administratif* in which there were separate administrative tribunals for deciding cases between the officials of the State and the citizens. According to him, exemption of the civil servants from the jurisdiction of the ordinary courts of law and providing them with the special tribunals was the negation of *equality*. Of course, Dicey himself saw that administrative authorities were exercising 'judicial' functions though they were not 'courts'. He, therefore, asserted: "Such transference of authority saps the foundation of the rule of law which has been for generations a leading feature of the English Constitution."

According to Dicey⁴, any encroachment on the jurisdiction of the courts and any restrictions on the subject's unimpeded access to them are bound to jeopardize his rights. In the words of Lord Denning⁵: "Our English law does not allow a public officer to shelter behind a *droit administratif*."

(iii) Predominance of legal spirit

Explaining the third principle, Dicey states that in many countries rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by a written Constitution; in England, it is not so. Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties. The Constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasised the role of the courts of law as guarantors of liberty and suggested that the rights would be secured more adequately if they were enforceable in the courts of law than by mere declaration of those rights in a document, as in the latter case, they can be ignored, curtailed or trampled upon. He stated: "The Law of the Constitution, the rules which in foreign countries naturally form part of

4. Cited by V.G. Ramachandran: *Administrative Law*, 1984, p. 6.

5. *Ministry of Housing v. Sharp*, (1970) 2 QB 223(226): (1970) 1 All ER 1009.

a constitutional Code, are not the source but the consequences of the rights of individuals, as defined and enforced by the courts."

According to him, mere incorporation or inclusion of certain rights in the written constitution is of little value in the absence of effective remedies of protection and enforcement. He propounded: "Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."⁶

(C) Application of doctrine

In England, the doctrine of the rule of law was applied in concrete cases. According to Wade⁷, if a man is wrongfully arrested by the police, he can file a suit for damages against them as if the police were private individuals. In *Wilkes v. Wood*⁸, it was held that an action for damages for trespass was maintainable even if the action complained of was taken in pursuance of the order of the Minister. In the famous case of *Entick v. Carrington*⁹, a publisher's house and papers were ransacked by the King's messengers sent by the Secretary of State. In an action for trespass, damages to the tune of £ 300 were awarded to the publisher. In the same manner, if a man's land is compulsorily acquired under an illegal order, he can bring an action for trespass against any person who tries to disturb his possession or attempts to execute the said order.

(D) Comments

Dicey's thesis had its own advantages and merits. The doctrine of rule of law proved to be an effective instrument in confining the administrative authorities within their limits. It served as a kind of touchstone to judge and test administrative actions.

According to Wade¹⁰, the British Constitution is founded on this doctrine. Yardley¹¹ also says that in broad principle the rule of law is accepted by all as a necessary constitutional safeguard. Dicey's theory has thwarted the recognition and growth of administrative law in England. Although, in the 20th century, complete absence of discretionary powers with the administration is not possible, yet this doctrine puts an effective control over the increase of executive and administrative powers and keeps those authorities within their bounds. As the supremacy of the

6. *The Law and the Constitution*, 1915, p. 195.

7. *Administrative Law*, 1994, p. 35.

8. (1763) 19 St Tr 1153.

9. (1765) 19 St Tr 1030.

10. *Administrative Law*, 1994, p. 24.

11. *A Source Book of English Administrative Law*, 1970, p. 3.

ordinary courts of law is accepted, they have power to control the actions taken by the administrative authorities. They must act according to law and cannot take any action as per their whims or caprice. It is the duty of the courts to see that these authorities must exercise their powers within the limits of the law.

The doctrine of the rule of law expounded by Dicey was never fully accepted in England even in his days. Wade¹² rightly says that if he had chosen to examine the scope of administrative law in England, he would have to admit that even in 1885 there existed 'a long list of statutes which permitted the exercise of discretionary powers which could not be called in question by courts' and the Crown enjoyed the immunity under the maxim '*The King can do no wrong*'. The shortcoming of Dicey's thesis was that he not only excluded arbitrary powers but also insisted that the administrative authorities should not be given wide discretionary powers, as according to him, 'wherever there is discretion, there is room for arbitrariness'. Thus, Dicey failed to distinguish *arbitrary power* from *discretionary power*. Though arbitrary power is inconsistent with the concept of rule of law, discretionary power is not, if it is properly exercised. The modern welfare State cannot work properly without exercising discretionary power. As Wade and Phillips¹³ observed: "If it is contrary to the rule of law that the discretionary authority should be given to Government departments or public officers then the rule of law is inapplicable to any modern constitution." As Mathew, J. stated: "If it is contrary to the rule of law that discretionary authority should be given to Government departments or public officers, then there is no rule of law in any modern State."¹⁴ In fact, many administrative tribunals have come into existence, which adjudicate upon the rights of the subjects not according to common law and the procedure of the ordinary courts but according to special laws applied to special groups. John Dickinson¹⁵ says: "Insofar as administrative adjudication is coming in certain fields to take the place of adjudication by the law courts, the supremacy of law as formulated by Dicey's first proposition is overridden."

It is also stated, that, in fact, Dicey misunderstood the real nature of the French *droit administratif*. The French system in many respects proved to be more effective in controlling the administrative powers than

12. *Administrative Law*, 1994, pp. 27-28.

13. *Constitutional Law*, 1960, pp. 64-65.

14. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, para 340: AIR 1975 SC 2299.

15. *Administrative Justice and Supremacy of Law*, 1927, pp. 36-37.

the common law system. Although, *Conseil d'Etat* technically speaking was a part of administration, in practice and reality, it was very much a court. The actions of the administration were not immune from the judicial control of this institution.

(E) Importance

One thing must be noted. In modern times, Dicey's rule of law has come to be identified with the concept of rights of citizens. As Wade and Phillips¹⁶ rightly state, it is accepted in almost all the countries outside the Communist world with some variations. It is invoked in modern democratic countries to keep control over the oppressive, capricious and arbitrary exercise of powers by the administrative authorities. The International Commission of Jurists, in their 'Delhi Declaration' made in the year 1959 accepted the idea of the rule of law as a modern form of law of nature.

(F) Droit Administratif

(i) Meaning

Under the French Legal System, known as *droit administratif*, there are two types of laws and two sets of courts independent of each other. The ordinary courts administer the ordinary civil law as between subjects and subjects. The administrative courts administer the law as between the subject and the State. An administrative authority or official is not subject to the jurisdiction of the ordinary civil courts exercising powers under the civil law in disputes between the private individuals. All claims and disputes in which these authorities or officials are parties fall outside the scope of the jurisdiction of ordinary courts and they must be dealt with and decided by the special tribunals. Though the system of *droit administratif* is very old, it was regularly put into practice by Napoleon in the 18th century.

(ii) Comments

If the French system did not adequately protect the individuals as against the State, it would be a serious criticism; but it was not so. The fact is that this system was able to provide expeditious and inexpensive relief and better protection to the citizens against administrative acts or omissions than the Common law system. Wade¹⁷ says: "Once rid of the illusion that administrative courts must inevitably be biased, one can see

16. *Constitutional Law*, 1960, pp. 70-73.

17. *Administrative Law*, 1994, p. 27; see also Brown and Garner: *French Administrative Law*, 1967, p. 133; Yardley: *Principles of Administrative Law*, 1981, pp. 44-45.

that they hold the keys to some problems which are insoluble under the separation of powers as practised in England."

(iii) *Concrete cases*

Let us examine some concrete cases to illustrate this proposition:

- (a) If an employee in a Government factory is injured by an explosion, according to the administrative courts in France, the risk should fall on the State, but the English courts will not hold the State liable unless the injured proves negligence of some servant of the Crown. Thus, English courts still apply the conservative and traditional approach that there should be no liability without fault; on the other hand, French administrative courts adopt the theory that 'justice requires that the State should be responsible to the workman for the risk which he runs by reason of his part in the public service'.
- (b) On one hand, when a passer-by chased a thief and was stabbed, the *Conseil d'Etat* held that he was entitled to recover damages which would not have been done under English Law. On the other hand, as the French administrative courts are recognised as guardians of public servants, the latter also get better protection from their employers. Thus, where a Rector of Strasbourg Academy was asked to take up some other duties and relieved from his post without in fact new duties being assigned to him, the administrative court held that he was removed from service and gave him redress. According to Denning¹⁸, in England, the ordinary courts of law could not have protected him because as a rule, public servants can be dismissed by the Crown at pleasure.
- (c) Under the Act of 1872, the French Government had a right to have a monopoly of manufacturing matches and for that purpose it could acquire the factories run by private persons. A provision to pay the compensation for compulsory acquisition was also made in the Act. However, if a factory was ordered to be closed on the ground of improvement of health, no compensation was required to be paid. In one case, an order to close the factory was passed by a Minister on the ground of improvement of health, but in reality, the motive was to avoid payment of compensation to the owner of the factory. An ordinary court could not have given any redress to the owner in this case, but the

18. I.L.I.: *Cases and Materials on Administrative Law in India*, 1966, Vol. I, p. 56.

Conseil d'Etat held that the power was abused by the Minister and awarded £ 20,000 to the victim factory owner.

- (d) A, a private gas company entered into an agreement with the Town Planning Council to supply gas at a particular rate for a period of 30 years. The agreement was made on the basis of the rates of coal in the year 1904. But after the First World War, the rates shot up. An application was filed by the gas company before the *Conseil d'Etat* for revision of rates. An ordinary court would have rejected this application and would not have granted the relief prayed for, but the *Conseil* accepted it and revised the rates. According to the *Conseil*, it was in the interest of the public at large that the company should continue to work rather than be wound up and if compelled to provide gas at the fixed rates, it amounted to compelling the works into liquidation.
- (e) *Barel case*: The Minister concerned did not permit certain candidates to appear at the civil service examination. It was reported in the newspaper that the Government had refused permission to candidates who were Communists. The Minister, however, denied it. The candidates approached the *Conseil d'Etat*, which quashed the order, since no reasons were recorded by the Minister for refusing such permission. The *Conseil* presumed that there were no reasons which would justify such a refusal. Thus, the *Conseil d'Etat* took the view in 1954 which was taken by English Courts in 1968.¹⁹
- (f) *Fortune case*: A wanted to appear at a competitive examination. He was not permitted to appear on the ground that his confidential file contained certain adverse remarks. In an action by A, the *Conseil d'Etat* went through the records and called upon the Secretary to justify the order. The Secretary pleaded that it was an 'Act de Government' (Act of State) and that the court had no jurisdiction to deal with the matter. He did not produce any document. The court passed an order to produce the entire file relating to the matter, went through it and quashed the order. In England, governed by the rule of law one cannot conceive of such a situation, for the ordinary courts of law have no right to interfere with any 'Act of State', or with ministerial discretion nor can they have access to the secret documents.

19. *Padfield v. Minister of Agriculture*, 1968 AC 997; (1968) 1 All ER 694; (1968) 2 WLR 924.

- (g) Again, when the decision of *Liversidge v. Anderson*²⁰ was brought to the notice of the French Administrative courts in which the principle of *subjective satisfaction* was upheld by the court in an ordinary court of law even in the case of a preventive detention, the Conseil d'Etat was unable to agree with the same. According to the French officials, the decision in *Liversidge case* cannot be accepted in any civilised country and more particularly in a country which had evolved the concept of rule of law.

(G) Modern concept of Rule of Law

As stated above, Dicey's concept of rule of law was not accepted fully even in 1885 when he formulated it, for even in that period, administrative law and administrative authorities were existent. Today, Dicey's theory of rule of law cannot be accepted in its totality. Davis²¹ gives seven principal meanings of the term 'Rule of Law':— (1) Law and order; (2) Fixed rules; (3) Elimination of discretion; (4) Due process of law or fairness; (5) Natural law or observance of the principles of natural justice; (6) Preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) Judicial review of administrative actions.

(H) Rule of Law under Constitution of India

Dicey's rule of law has been adopted and incorporated in the Constitution of India. The preamble itself enunciates the ideals of justice, liberty and equality. In Chapter III of the Constitution these concepts are enshrined as fundamental rights and are made enforceable. The Constitution is supreme and all the three organs of the Government, viz. legislature, executive and judiciary are subordinate to and have to act in accordance with it. The principle of judicial review is embodied in the Constitution and the subjects can approach High Courts and the Supreme Court for the enforcement of fundamental rights guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action is *mala fide*, the same can be quashed by the ordinary courts of law. All rules, regulations, ordinances, bye-laws, notifications, customs and usages are 'laws' within the meaning of Article 13 of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared as *ultra vires* by the Supreme Court and by High Courts. The President is required to take an oath to preserve, protect and defend the Constitution. No person shall be de-

20. 1942 AC 206: (1941) 3 All ER 338.

21. *Administrative Law*, 1959, pp. 24-27.

rived of his life or personal liberty except according to *procedure established by law*²² or of his property save by *authority of law*²³. The executive and the legislative powers of the States and the Union have to be exercised in accordance with the provisions of the Constitution. The Government and the public officials are not above the law. The maxim '*The King can do no wrong*' does not apply in India. There is *equality before the law* and *equal protection of laws*.²⁴ The Government and public authorities are also subject to the jurisdiction of ordinary courts of law and for similar wrongs are to be tried and punished similarly. They are not immune from ordinary legal process nor is any provision made regarding separate administrative courts and tribunals.²⁵ In public service also the doctrine of equality is accepted.²⁶ Suits for breach of contract and torts committed by the public authorities can be filed in ordinary law courts and damages can be recovered from the State Government or the Union Government for the acts of their employees.²⁷ Thus, it appears that the doctrine of rule of law is embodied in the Constitution of India, and is treated as the basic structure of the Constitution.²⁸

In spite of such apparently enviable position of subjects, in almost all the fields of industry, commerce, education, transport, banking, insurance, etc. there is interference by the administrative authorities with the actions of the individuals, companies and other corporate and non-corporate bodies, observes Justice Ramaswamy.²⁹ From the constitutional point of view there is large-scale delegation of legislative and judicial powers to these administrative authorities. These authorities have been extending their tentacles into social, economic and political domains. Wide discretionary powers are conferred on these administrative authorities. For the purpose of national planning the executive is armed with vast powers in respect of land ceiling, control of basic industries, taxation,

2. Article 21, Constitution of India.

3. Article 300-A, Constitution of India.

4. Article 14, Constitution of India.

5. It may, however, be noted here that by the Constitution (42nd Amendment) Act, 1976, Parliament is empowered under Chapter XIV-A (Arts. 323-A and 323-B) to set up various administrative tribunals for dealing with subjects ranging from disputes of government servants to foreign exchange and production and distribution of foodstuffs and other essential commodities.

6. Article 16, Constitution of India.

7. See Lecture X (*infra*).

8. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299; *Kesavanand Bharathi v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461; *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207; *Kannungo v. State of Orissa*, (1995) 5 SCC 96: AIR 1995 SC 1655.

9. (1958-59) 1 JILI, pp. 31-32.

mobilisation of labour, etc. Further, it is also erroneous to believe that individual liberty can be protected only by the traditional doctrine of rule of law. Experience shows that not only the executive but even Parliament elected by the people may pass some demonic statutes like the Preventive Detention Act, or Maintenance of Internal Security Act, 1971 (MISA), National Security Act, 1980 (NSA) and encroach upon the liberty of the subjects. Ultimately, as Prof. Harold Laski says: "Eternal vigilance is the price of liberty" and not a particular principle or doctrine of law.

At this juncture, we may consider the position prevailing in India vis-a-vis the third principle of Dicey's doctrine of rule of law, viz. predominance of the legal spirit. Until recently this principle was being studied and examined in the context of interpreting the provisions of the Constitution. In *Chief Settlement Commr., Punjab v. Om Parkash*³⁰, the Supreme Court observed:

"In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court."³¹

(I) Habeas Corpus case³²

The position has, however, radically changed with the leading pronouncement of the Supreme Court in the case of *A.D.M., Jabalpur v. Shivakant Shukla*³¹, popularly known as the '*Habeas Corpus case*'. In this case, the Supreme Court was confronted with the question whether the third limb of Dicey's doctrine was an integral part of the Indian concept of rule of law.

On June 25, 1975 Emergency was proclaimed by Mrs Gandhi's Government on account of "internal disturbances". By virtue of Article 35 of the Constitution, the citizens' seven classic freedoms under Article 1 stood automatically suspended. On June 27, the President issued an order under Article 359 suspending the enforcement of Articles 14, 21 and 22 also. On the night of June 25 and thereafter a large number of persons were detained under the Maintenance of Internal Security Act, 1971 (MISA). Many of them were not even informed of the grounds for the detention. Some of them filed writ petitions in different High Courts challenging the detention orders as illegal and praying for the issue of

30. AIR 1969 SC 33; (1968) 3 SCR 655.

31. *Id.* at p. 36 (AIR).

32. *A.D.M., Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521; AIR 1976 SC 1207.

writ of *Habeas Corpus*. When those petitions came up for hearing, the Government raised a preliminary objection regarding maintainability of the petitions on the ground that in asking for release by writ of *Habeas Corpus*, the petitioners (detenus) were in substance claiming that they had been deprived of their personal liberty in violation of the *procedure established by law* but that was a plea available to them only under Article 21 of the Constitution and since enforcement of Article 21 was suspended by the Presidential Order of June 27, 1975, the petitions were liable to be dismissed at the threshold.

This preliminary objection was overruled for one reason or the other by various High Courts.³³ The Governments of the States concerned (e.g. the Government of Madhya Pradesh through the Additional District Magistrate, Jabalpur) and the Government of India filed appeals in the Supreme Court against the decisions of those High Courts. The case was heard by a Constitutional Bench of five judges consisting of Ray, C.J., Khanna, Beg, Chandrachud and Bhagwati, JJ.

To simplify the point, it may be stated that the narrow issue before the Supreme Court was whether there was any 'Rule of Law' in India apart from Article 21 of the Constitution of India.

The majority of the Bench (Ray, C.J., Beg, Chandrachud and Bhagwati, JJ.) answered the issue in the negative and observed:

"The Constitution is the mandate. The Constitution is the rule of law. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre-Constitution or post-Constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the time of Emergency. Article 21 is our rule of law regarding life and liberty. No other rule of law can have separate existence as a distinct right. The rule of law is not merely a catchword or incantation. It is not a law of nature consistent and invariable at all times and in all circumstances. There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution."³⁴

33. All., A.P., Bom., Del., Karn., M.P., Mad., Punj. and Raj.

34. For detailed discussion see SCC paras (per Ray, C.J. 41-52, 103, 136-39; Beg, J. 165, 176-93, 242-44, 278-80; Chandrachud, J. 330, 347-50, 369-75, 419; Bhagwati, J. 435-39, 458-66, 472, 485-87. For a scathing criticism of the majority view see H.M. Seervai: *Habeas Corpus case: Emergency and Future Safeguards*, 1977.

Justice Khanna, however did not agree with the majority view. In a powerful dissent, His Lordship observed:

“Rule of law is the antithesis of arbitrariness. [It is accepted] in all civilised societies. [It] has come to be regarded as the mark of a free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. *Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law.* This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning.... As observed by Friedmann, in a purely formal sense, any system of norm based on a hierarchy of orders, even the organised mass murders of Nazi regime qualify as law. This argument, cannot, however, disguise reality of the matter that hundreds of innocent lives have been taken because of the absence of rule of law. A State of negation of rule of law would not cease to be such a State because of the fact that such a State of negation of rule of law has been brought about by statute. *Absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws.*”³⁵

(emphasis supplied)

It is submitted that the majority judgment in the *Habeas Corpus* case is clearly erroneous, unjust and contrary to the doctrine of Rule of Law. It is further submitted that the majority failed to consider in its proper perspective the most important fact that Article 21 (i.e. the written Constitution) does not confer a right to life or personal liberty. The said right *inheres* in the body of every living person and Article 21 or for that purpose any written Constitution is not the sole repository of the right to life and personal liberty and in these circumstances, the said right can never be taken away by the executive.³⁶

2. SEPARATION OF POWERS

(A) General

According to M.P. Jain³⁷: “If the ‘Rule of Law’ as enunciated by Dicey affected the growth of Administrative Law in Britain, the doctrine

35. *A.D.M., Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521, paras 525-36, 575, 593.

36. For detailed discussion of the *Habeas Corpus* case, see C.K. Thakker: *Administrative Law*, 1996, pp. 406-14.

37. *Treatise on Administrative Law*, 1996, Vol. 1, p. 30.

of 'Separation of Powers' had an intimate impact on the development of Administrative Law in the U.S.A.' Davis³⁸ also stated: "Probably, the principal doctrinal barrier to the development of the administrative process has been the theory of separation of powers."

(B) Meaning

It is generally accepted that there are three main categories of governmental functions — (i) the Legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in a State — (i) the Legislature, (ii) the Executive, and (iii) the Judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and be exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power and the judiciary cannot exercise legislative or executive power of the Government.

(C) Historical background

The doctrine of separation of powers has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle. In the 16th and 17th centuries, French philosopher John Bodin and British politician Locke respectively had expressed their views about the theory of separation of powers. But it was Montesquieu who for the first time formulated this doctrine systematically, scientifically and clearly in his book '*Esprit des Lois*' (The Spirit of the Laws), published in the year 1748.

(D) Montesquieu's doctrine

Writing in 1748, Montesquieu³⁹ said:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression.

38. *Administrative Law Treatise*, 1958, Vol. I, p. 68.

39. *The Spirit of the Laws* (trans. Nugent), pp. 151-52.

Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals."

Lord Acton rightly said: "Every power tends to corrupt and absolute power tends to corrupt absolutely." In the 18th century, there was complete and full-fledged monarchy in France. Louis XIV was well-known for his absolute and autocratic powers. The King and his administrators were acting arbitrarily. The subjects had no right or liberty at all. On the other hand, Montesquieu was very much impressed by the liberal thoughts of Locke and he also based his doctrine on analysis of the British Constitution during the first part of the 18th century, as he understood it. According to him, the secret of an Englishman's liberty was the separation and functional independence of the three departments of the Government from one another.

According to Wade and Phillips⁴⁰, separation of powers may mean three different things—

- (i) that the same persons should not form part of more than one of the three organs of Government, e.g. the Ministers should not sit in Parliament;
- (ii) that one organ of the Government should not control or interfere with the exercise of its function by another organ, e.g. the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and
- (iii) that one organ of the Government should not exercise the functions of another, e.g. the Ministers should not have legislative powers.

(E) Effect

The doctrine of separation of powers as propounded by Montesquieu had tremendous impact on the development of administrative law and functioning of Governments. It was appreciated by the English and American jurists and accepted by politicians. In his book '*Commentaries on the Laws of England*', published in 1765, Blackstone had observed that if the legislative, the executive and the judicial functions were given to one man, there was an end of personal liberty. Madison also proclaimed: "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very

40. *Constitutional Law*, 1960, pp. 22-34.

definition of tyranny." The Constituent Assembly of France had declared in 1789 that there would be nothing like a Constitution in the country where the doctrine of separation of powers was not accepted.

(F) Defects

Though, theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real-life situations. Mainly, the following defects were found in this doctrine:

- (a) Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point of time, this doctrine was adopted therein. As Prof. Ullman says: "England was not the classic home of separation of powers." Donoughmore Committee also observed: "In the British Constitution there is no such thing as the absolute separation of the legislative, executive and judicial powers." It is said: "*Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw.*"

(emphasis supplied)

- (b) This doctrine is based on the assumption that the three functions of the Government, viz. legislative, executive and judicial are distinguishable from one another. But in fact, it is not so. There are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision. As President Woodrow Wilson stated: "The trouble with the theory is that Government is not a machine, but a living thing.... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. *Their cooperation is indispensable, their warfare fatal*" (emphasis supplied).⁴¹ According to Friedmann and Benjafield, 'the truth is that each of the three functions of the Government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in Government'.

- (c) It is impossible to take certain actions if this doctrine is accepted in its entirety. Thus, if the legislature can only legislate, then it cannot punish anyone, committing a breach of its privilege; nor can it delegate any legislative function even though it does not

41. Friedmann: *Law in a Changing Society*, 1996, p. 382.

know the details of the subject-matter of the legislation and the executive authority has expertise over it; nor could the courts frame rules of procedure to be adopted by them for the disposal of cases. Separation of powers, thus, can only be relative and not absolute.

- (d) Modern State is a welfare State and it has to solve many complex socio-economic problems and in this state of affairs also, it is not possible to stick to this doctrine. As Justice Frankfurter says: "Enforcement of a rigid conception of separation of powers would make modern Government impossible." Strict separation of powers is a theoretical absurdity and practical impossibility.⁴²
- (e) According to Basu⁴³, in modern practice, the theory of separation of powers means an *organic* separation and a distinction must be drawn between 'essential' and 'incidental' powers and that one organ of the Government cannot usurp or encroach upon the *essential* functions belonging to another organ, but may exercise some *incidental* functions thereof.
- (f) The fundamental object behind Montesquieu's doctrine was the liberty and freedom of an individual; but that cannot be achieved by mechanical division of functions and powers. In England, theory of separation of powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be rule of law and impartial and independent judiciary and eternal vigilance on the part of the subjects.

(G) Importance

Thus, on the whole, the doctrine of separation of powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive. The object of the doctrine is to have "a Government of law rather than of official will or whim". Montesquieu's great point was that if the total power of Government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive.⁴⁴ Again, almost all the jurists accept one feature of this doctrine that the judiciary must be independent of and

42. Friedmann: *Law in a Changing Society*, 1996, pp. 382-83.

43. *Administrative Law*, 1996, p. 24.

44. Jaffe and Nathanson: *Administrative Law*, 1961, p. 34.

separate from the remaining two organs of the Government, viz., legislature and executive.

The most important aspect of the doctrine of separation of powers is judicial independence from administrative discretion. "There is no liberty, if the judicial power be not separated from the legislative and executive."⁴⁵ The judiciary is beyond comparison the weakest of the three departments of power. It has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. *There is no liberty, if the judicial power be not separated from the legislative and the executive.* (emphasis supplied)⁴⁶

(H) Separation of Powers in practice

(i) U.S.A.

The doctrine of separation of powers has been accepted and strictly adopted by the Founding Fathers of the Constitution of the United States of America. There the legislative powers are vested in the Congress, the executive powers in the President and the judicial powers in the Supreme Court and the courts subordinate thereto. In the American Constitution, there is a system of 'checks and balances' and the powers vested in one organ of the Government cannot be exercised by any other organ. In theory, no one organ of the Government can trench upon or encroach upon the power of the other. Jaffe and Nathanson stated: "The division of our Government into three great establishments is an indisputable fact—writ large and clear in the basic documents."⁴⁷

Jefferson said: "The concentration of legislative, executive and judicial powers in the same hands is precisely the definition of despotic Government. It would be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. *One hundred and seventy-three despots would surely be as oppressive as one.*"⁴⁸ (emphasis supplied)

Though, in 1787, when the American Constitution was drafted, the doctrine of separation of powers was adopted, with the growth of administrative process the rigours of the doctrine have been relaxed. The

45. Friedmann: *Law in a Changing Society*, 1996, p. 383.

46. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, para 320: AIR 1975 SC 2299 (Per Mathew, J.).

47. *Administrative Law*, 1961, p. 33.

48. Works: 3, p. 223; cited in *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 (para 319): AIR 1975 SC 2299.

President now exercises legislative functions by sending messages to the Congress and by exercise of the right of veto. The Congress has judicial power of impeachment and the Senate exercises executive powers regarding treaties and in the making of certain appointments. The Congress has delegated legislative powers to various administrative authorities and regulatory agencies and these bodies exercise all types of functions. Thus, a single agency acts 'successively as legislator, investigator, prosecutor, jury, judge and appellate tribunal' and the Supreme Court has never held that the combination of all the powers in one agency is unconstitutional.

(ii) *England*

Although Montesquieu has based his doctrine of separation of powers taking into account the British Constitution, as a matter of fact at no point of time was this doctrine accepted in its strict sense in England. On the contrary, in reality, the theory of integration of powers has been adopted in England. Though the three powers are vested in three organs and each has its own peculiar features, it cannot be said that there is no 'sharing out' of the powers of the Government. Thus, the Lord Chancellor is the Head of the Judiciary, Chairman of the House of Lords (legislature), a member of the Executive and often a member of the Cabinet. The Judges exercise executive functions under the Trust Act and in supervision of wards of court and also legislative functions in making rules of courts regulating their own procedure. Members of the Cabinet are also members of the Legislature and are responsible to it and they play a very important part in legislative activities. Powers are conferred on them to make subordinate legislations and they also exercise judicial powers in different forms of administrative tribunals. The House of Commons is not exclusively concerned with legislative activities, as it exercises judicial powers also in cases of breach of its own privileges.

(iii) *India*

On a casual glance at the provisions of the Constitution of India, one may be inclined to say that the doctrine of separation of powers is accepted in India. Under the Indian Constitution, the executive powers are with the President,⁴⁹ the legislative powers with Parliament⁵⁰ and the judicial powers with the judiciary⁵¹ (the Supreme Court, High Courts and subordinate courts). The President holds his office for a fixed period. His functions and powers are enumerated in the Constitution itself. Parliament

49. Article 53(1), *Constitution of India*.

50. *Delhi Laws Act, 1912, In re*, AIR 1951 SC 332 (346-47); 1951 SCR 747.

51. *Id.* at p. 386 (AIR), see also *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299 (2435).

is competent to make any law subject to the provisions of the Constitution and there is no other limitation on its legislative power. It can amend the law prospectively or even retrospectively but it cannot declare a judgment delivered by a competent court void or of no effect. Parliament has also inherited all the powers, privileges and immunities of the British House of Commons. Similarly, the judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or by the legislature. The Supreme Court and High Courts are given the power of judicial review and they can declare any law passed by Parliament or Legislature as *ultra vires* or unconstitutional. Taking into account these factors, some jurists are of the opinion that the doctrine of separation of powers has been accepted in the Constitution of India and is a part of the basic structure of the Constitution.⁵² Separation of functions is not confined to the doctrine of separation of powers. It is a part of essential structure of any developed legal system. In every democratic society, the process of administration, legislation and adjudication are more clearly distinct than in a totalitarian society.⁵³ In *Kartar Singh v. State of Punjab*⁵⁴ K. Ramaswamy, J. stated: "It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution." In *Golak Nath v. State of Punjab*⁵⁵, Subba Rao, C.J. observed:

"The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them."⁵⁶

But if we study the constitutional provisions carefully, it is clear that the doctrine of separation of powers has not been accepted in India in its strict sense. There is no provision in the Constitution itself regarding the division of functions of the Government and the exercise thereof.

52. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299.

53. *Kesavananda Bharathi v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461; *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207; *Supreme Court Advocates on Record Assn. v. Union of India*, (1993) 4 SCC 441: AIR 1994 SC 268.

54. (1994) 3 SCC 569(736): AIR 1995 SC 1726; *Managing Director, ECIL v. B. Karunakar*, (1993) 4 SCC 727 (778): AIR 1994 SC 1074.

55. AIR 1967 SC 1643: (1967) 2 SCR 762.

56. *Id.* at p. 1655 (AIR).

Though, under Articles 53(1) and 154(1), the executive power of the Union and of the States is vested in the President and the Governors respectively, there is no corresponding provision vesting the legislative and judicial power in any particular organ. The President has wide legislative powers.⁵⁷ He can issue ordinances, make laws for a State after the State Legislature is dissolved, adopt the laws or make necessary modifications and the exercise of this legislative power is immune from judicial review. He performs judicial functions also. He decides disputes regarding the age of a judge of a High Court or the Supreme Court for the purpose of retiring him⁵⁸ and cases of disqualification of members of any House of Parliament.⁵⁹

Likewise, Parliament exercises legislative functions and is competent to make any law not inconsistent with the provisions of the Constitution, many legislative functions are delegated to the executive. In certain matters, Parliament exercises judicial functions also. Thus, it can decide the question of breach of its privilege and, if proved, can punish the person concerned.⁶⁰ In case of impeachment of the President, one House acts as a prosecutor and the other House investigates the charges and decides whether they were proved or not. The latter is a *purely judicial* function.⁶¹ On the other hand, many powers which are strictly judicial have been excluded from the purview of courts.

Though judiciary exercises all judicial powers, at the same time, it exercises certain executive or administrative functions also. The High Court has supervisory powers over all subordinate courts and tribunals⁶² and also power to transfer cases. High Courts and the Supreme Court have legislative powers also and they frame rules regulating their own procedure for the conduct and disposal of cases.⁶³

Thus, the doctrine of separation of powers is not accepted fully in the Constitution of India, and we agree with the observations of Justice Mukherjea in *Ram Jawaya v. State of Punjab*⁶⁴:

57. Articles 123 and 356, Constitution of India; see also Article 213, Constitution of India.

58. Articles 124(2-A), 217(3), Constitution of India; see also *Union of India v. Jyoti Prakash Mitter*, (1971) 1 SCC 396: AIR 1971 SC 1093.

59. Article 103, Constitution of India. See also Article 192, Constitution of India.

60. Article 105, Constitution of India.

61. Article 61, Constitution of India.

62. Article 227, Constitution of India; see also Lecture X (*infra*).

63. Articles 145, 225, Constitution of India.

64. AIR 1955 SC 549: (1955) 2 SCR 225.

“The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”⁵⁵

55. *Id.* at p. 556 (AIR); see also *Jayantilal v. F. N. Rana*, AIR 1964 SC 648, 655-56; *Chandra Mohan v. State of U.P.*, AIR 1966 SC 1987 (1992-93); *Mallikarjuna v. State of A.P.*, (1990) 2 SCC 707 (714); AIR 1990 SC 1251.

Lecture III

Classification of Administrative Actions

It is customary to divide functions of Government into three classes: legislative, executive (or administrative) and judicial.

—WADE AND PHILLIPS

The dividing line between an administrative power and quasi-judicial power is quite thin and is being gradually obliterated.... In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

—JUSTICE HEGDE

Duty to act judicially would arise from the very nature of the functions intended to be performed; it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power.

—JUSTICE SHAH

SYNOPSIS

1. General
2. Need for classification
3. Legislative, Executive and Judicial Functions — General Distinction
4. Legislative Functions
5. Legislative and Judicial Functions — Distinction
6. Legislative and Administrative Functions — Distinction
7. Judicial Functions
8. Quasi-Judicial Functions
9. Quasi-Judicial Functions distinguished from Judicial Functions
10. Administrative Functions
11. Administrative and Quasi-Judicial Functions — Distinction
 - (i) General
 - (ii) Object
 - (iii) Lis
 - (iv) Quasi-lis
 - (v) Duty to act judicially
 - (vi) Leading Cases
 - (vii) Test
 - (viii) Quasi-Judicial Functions: Illustrations
 - (ix) Administrative Functions: Illustrations
12. Administrative Instructions

1. GENERAL

As observed in Lecture II, there are three organs of Government — (1) Legislature, (2) Executive, and (3) Judiciary. These three organs essentially perform three classes of governmental functions — (1) Legislative, (2) Executive or administrative, and (3) Judicial. The function of the legislature is to enact the law; the executive is to administer the law and the judiciary is to interpret the law and to declare what the law is. But as observed by the Supreme Court in *Jayantilal Amratlal v. F. N. Rana*¹, it cannot be assumed that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by the judiciary. In *Halsbury's Laws of England*² also, it is stated that howsoever the term 'the Executive' or 'the Administration' is employed, there is no implication that the functions of the executive are confined exclusively to those of an executive or administrative character. Today, the executive performs variegated functions, viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licences, etc. (administrative); to make rules, regulations and bye-laws, to fix prices, etc. (legislative); to adjudicate on disputes, to impose fine and penalty, etc. (judicial). Schwartz rightly states that rule-making (quasi-legislative) and adjudication (quasi-judicial) have become the chief weapons in the administrative armoury.³ 'Quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.⁴

2. NEED FOR CLASSIFICATION

A question which arises for our consideration is whether the functions performed by the executive authorities are purely administrative, quasi-judicial or quasi-legislative in character. The answer is very difficult, as there is no precise, perfect and scientific test to distinguish these functions from one another. A further difficulty arises in a case in which a single proceeding may at times combine various aspects of the three functions. The courts have not been able to formulate any definite test for the purpose of making such classification. Yet, such classification is essential and inevitable as many consequences flow from it, e.g. if the executive authority exercises a judicial or quasi-judicial function, it must follow the principles of natural justice and is amenable to the writ of *certiorari* or prohibition, but if it is an administrative, legislative or quasi-

1. AIR 1964 SC 648 (655): (1964) 5 SCR 294.

2. *Halsbury's Laws of England*, 4th Edn., Vol. 1, p. 20.

3. *French Administrative Law and the Common Law World*, 1954, p. 89.

4. *Federal Trade Commission v. Ruberoid Co.*, (1952) 343 US 470 (488): 96 L. Ed. 1081.

legislative function, this is not so. If the action of the executive authority is legislative in character, the requirement of publication, laying on the table, etc. should be complied with, but it is not necessary in the case of a pure administrative action. Again, if the function is administrative, delegation is permissible, but if it is judicial, it cannot be delegated. An exercise of legislative power *may* not be held invalid on the ground of unreasonableness, but an administrative decision can be challenged as being unreasonable. It is, therefore, necessary to determine what type of function the administrative authority performs.

3. LEGISLATIVE, EXECUTIVE AND JUDICIAL FUNCTIONS —GENERAL DISTINCTION

In *Vora Fida Ali v. State*⁵, a Division Bench of the Gujarat High Court quoted with approval the general distinction between legislative, executive and judicial functions, as pointed out by Willis in his '*Treatise on Constitutional Law*', in the following words:

"Mr Green has defined the legislative power as the power to create rights, powers, privileges, or immunities, and their correlatives, as well as status, not dependent upon any previous rights, duties, etc. (or for the first time), that is, apparently, the power of creating antecedent legal capacities and liabilities. He defines judicial power as the power to create some right or duty dependent upon a previous right or duty, that is, apparently the power to create remedial legal capacities and liabilities. He finds difficulty in defining executive power, except as including all governmental power which is not a part of the process of legislation or adjudication, that is, the power which is concerned mostly with the management and execution of public affairs."⁶

It was observed by the Court: "All that the Court can do is to consider the act in question and to decide on an application of broad and general considerations whether the act is a legislative or an executive or a judicial act without making any attempt to formulate rigid or exhaustive tests for determining the nature or character of the act." It is accepted that any attempt to rigidly define and demarcate three functions of the Government is almost impossible. However, for review of actions of executive Government, this conceptual distinction is meaningful.⁷ The Constitution of India has not made an absolute or rigid division of functions between the three agencies of the State.⁸

5. AIR 1961 Guj 151: (1961) 2 Guj LR 343.

6. *Id.* at pp. 170-71 (AIR): 380-81 (GLR).

7. Benjafield and Whitmore: *Australian Administrative Law*, 1966, p. 102.

8. *Jayantilal v. F.N. Rana* (*supra*).

4. LEGISLATIVE FUNCTIONS

Legislative functions of the executive consists of making rules, regulations, bye-laws, etc. It is, no doubt, true that any attempt to draw a distinct line between legislative and administrative functions is difficult in theory and impossible in practice. Though difficult, it is necessary that the line must be drawn as different legal rights and consequences may ensue. As Schwartz⁹ said: "If a particular function is termed 'legislative' or 'rule-making' rather than 'judicial' or 'adjudication', it may have substantial effects upon the parties concerned. If the function is treated as legislative in nature, there is no right to a notice and hearing unless a statute expressly requires them."¹⁰ In the leading case of *Bates v. Lord Hailsham*¹¹, Megarry, J. observed that "the rules of natural justice do not run in the sphere of legislation, primary or delegated". Wade¹² also said: "There is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute." Fixation of price, declaration of a place to be a market yard, imposition of tax, establishment of Municipal Corporation under the statutory provision, extension of limits of a town area committee, etc. are held to be legislative functions.

5. LEGISLATIVE AND JUDICIAL FUNCTIONS — DISTINCTION

In *Prentis v. Atlantic Coast Line Co.*¹³, Justice Holmes points out the distinction between legislative and judicial functions in the following words:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."¹⁴

According to Justice Holmes, the main aspect is the element of *time*. A rule (legislative function) prescribes *future* pattern of conduct and cre-

9. *Administrative Law*, 1976, pp. 143-44; see also de Smith: *Judicial Review of Administrative Action*, 1995, pp. 1006-08.

10. *Union of India v. Cynamide India Ltd.*, (1987) 2 SCC 720 (741-42); AIR 1987 SC 1802 (1806-11).

11. (1972) 3 All ER 1019 (1023-24); (1972) 1 WLR 1373 (1378); see also *Union of India v. Cynamide India Ltd.*, (1987) 2 SCC 720; AIR 1987 SC 1802.

12. *Administrative Law*, 1994, p. 570.

13. (1908) 211 US 210; (1908) 53 L Ed 150.

14. *Id.* at pp. 226-27 (US); 158-59 (L Ed); see also *Express Newspaper (P) Ltd. v. Union of India*, AIR 1958 SC 578 (610); 1959 SCR 12.

ates *new* rights and liabilities, whereas a decision (judicial function) determines rights and liabilities on the basis of *present or past* facts, and declares the *pre-existing* rights and liabilities. In the words of Green: "The legislative function then is general and relates to the future, whereas the judicial function is specific, final and ordinarily relates to the past."

On the other hand, according to some jurists, the element of *applicability* must be taken into account in distinguishing a legislative function from a judicial function. Prof. Dickinson says: "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the *abstract* and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates *concretely* upon individuals in their individual capacity." In other words, "Legislature usually acts by determinations of *general* applicability addressed to indicated but unnamed and unspecified persons and situations. A court of law, on the other hand, acts by decisions that are *specific* in applicability and addressed to particular individuals or situations".¹⁵ Green states: "Perhaps it would be better to say that it is a legislative function to make all substantive law, and a judicial function finally to determine constitutional jurisdiction and the application of substantive law to specific facts."

No doubt, in most of the cases, the aforesaid two theories help in distinguishing legislative and judicial functions, but in certain cases they create some difficulties and seem to be defective, e.g. sometimes administrative adjudication creates some future rights; yet it cannot be said to be performing a legislative function. On the other hand, if the test of *applicability* is adopted, rate-making, price-fixing, etc. which are required to be done after hearing the parties, may be classified as judicial, while, in fact, they are legislative in character and the object of hearing is only to collect necessary information.¹⁶

6. LEGISLATIVE AND ADMINISTRATIVE FUNCTIONS — DISTINCTION

The distinction between legislative and administrative functions is very difficult to draw. However, different tests have been formulated. Griffith and Street¹⁷ have suggested two tests — (1) As per the institutional test, that which the Legislature enacts is legislation. But the word 'enacts' includes all kinds of actions taken by Parliament and thus, this

15. *Administrative Justice and Supremacy of Law*, 1927, p. 21.

16. *Union of India v. Cynamide India Ltd.*, (1987) 2 SCC 720: AIR 1987 SC 1802.

17. *Principles of Administrative Law*, 1973, p. 50.

test is not appropriate. (2) According to the second test, the extent of applicability of the act should be determined. A power to make rules of *general application* is a legislative power and the rule is a legislative rule, while a power to give an order in *specific cases* is an executive power and the order is an executive action. de Smith¹⁸ also says that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases, while an administrative act is the application of a general rule to a particular case. But this test is also not complete. The difficulty here is that of distinguishing what is 'general' from what is 'specific' or 'particular', as the difference is only a matter of degree.

Thus, on the one hand, in *Blackpool Corpn. v. Locker*¹⁹, under the provisions of the Defence Regulations, 1939, the Minister of Health by a circular delegated requisitioning powers. One of the conditions was that there should not be requisitioning of furniture. This condition was violated when A's house was requisitioned. The question was whether the instructions in the circular were legislative, restricting the delegated power, or merely administrative directions as to how the power should be exercised. The Court of Appeal held that the conditions were legislative in character and must be complied with. As it was not done, the requisition was bad. On the other hand, in *Lewisham Borough Council v. Roberts*²⁰, the power to requisition a part of a particular house was delegated to a local authority. The Court of Appeal held it to be an administrative act and not a legislative act. In *Union of India v. Cynamide India Ltd.*²¹, price fixation was held to be legislative action, whereas in *State of Haryana v. Ram Kishan*²², an action of premature termination of a mining lease was held to be administrative action.

According to the Committee on Ministers' Powers, the chief characteristics of a legislative function are its generality and prospectivity. A legislative act looks to the *future* and changes the existing conditions by making a new rule to be applied thereafter to all or some part of those subject to his power and determines what shall in future be the mutual rights and responsibilities of the parties by prescribing a binding rule of conduct, while an administrative order is issued to *specific* persons only. But this test is also not sufficient. Thus, a power vested in a Board of Education to make grants to secondary schools if they satisfied the

18. *Judicial Review of Administrative Action*, 1995, p. 1006.

19. (1948) 1 KB 349; (1948) 1 All ER 85.

20. (1949) 2 KB 608; (1949) 2 All ER 815.

21. (1987) 2 SCC 720; AIR 1987 SC 1802.

22. (1988) 3 SCC 416; AIR 1988 SC 1301.

Board that they were being efficiently maintained might appear, on the face of it, to be plainly executive or administrative but, if the Board were to elaborate in detail the conditions under which it would regard a school as qualifying for a grant, and issue circulars setting out such conditions for the information of schools, this would seem to be in substance the formulation of a general rule. *Thus, the function of the Board may be regarded as legislative from one point of view and as administrative from another.*²³ (emphasis supplied)

The Committee has rightly observed: "It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative function on the one hand and purely administrative on the other."²⁴

According to de Smith²⁵, the following legal consequences flow from the aforesaid distinction:

- (1) If an order is legislative in character, it has to be published in a certain manner, but this is not necessary if it is of an administrative nature.
- (2) If an order is legislative in character, the court will not issue a writ of *certiorari* to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing a writ of *certiorari*.
- (3) Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of *mala fide* or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.
- (4) Only in most exceptional circumstances can legislative powers be sub-delegated, but administrative powers can always be sub-delegated.
- (5) Duty to give reasons applies to administrative orders but not to legislative orders.

7. JUDICIAL FUNCTIONS

According to the Committee on Ministers' Powers²⁶, a pure judicial function presupposes an existing dispute between two or more parties and it involves four requisites—

23. Friedmann and Benjafield: *Principles of Australian Administrative Law*, 1962, p. 41.

24. *Union of India v. Cynamide India Ltd.*, (1987) 2 SCC 720 (735): AIR 1987 SC 1802 (1806-07).

25. *Judicial Review of Administrative Action*, 1980, pp. 71-73.

26. *Report of the Committee on Ministers' Powers*, 1932, CMD 4060 (4073-74).

- (1) the presentation (not necessarily oral) of their case by the parties to the dispute;
- (2) if the dispute is a question of fact, the ascertainment of fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties, on evidence;
- (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and
- (4) a decision which disposes of the whole matter by finding upon the facts in dispute and 'an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law'.

Thus, in a pure judicial function, the aforesaid four requisites must be present. If these requisites are present, the decision is a judicial decision even though it might have been made by any authority other than a court, e.g. by a Minister, Board, Executive Authority, Administrative Officer or Administrative Tribunal.

8. QUASI-JUDICIAL FUNCTIONS

The word 'quasi' means 'not exactly'. Generally, an authority is described as 'quasi-judicial' when it has some of the attributes or trappings of judicial functions, but not all. In the words of the Committee on Ministers' Powers, 'the word 'quasi', when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them'²⁷, e.g. if a transaction is described as a quasi-contract, it means that the transaction in question has some but not all the attributes of a contract.

According to the Committee, a quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) above but does not necessarily involve (3) and never involves (4). The place of (4) is, in fact, taken by administrative action, the character of which is determined by the Minister's choice.

For instance, suppose a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not to take action. In such a case he must consider the representations of the parties and ascertain the facts — to that extent the decision contains a judicial element. But, the facts once ascertained, his decision does not depend on any legal or statutory direction, for *ex*

27. *Province of Bombay v. Khushaldas Advani*, AIR 1950 SC 222; 1950 SCR 621.

hypothesi he is left free within the statutory boundaries to take such administrative action as he may think fit: that is to say that the matter is not finally disposed of by the process of (4).

This test has, however, been subject to criticism by jurists. It does not give a complete and true picture. It is based on a wrong hypothesis. The Committee characterised the judicial function as being devoid of any discretionary power but obliged to merely apply the law to the proved facts. In reality, it is not so. The courts of law also exercise discretion. It may be more pervasive in administrative actions than in judicial functions but the difference is of degree only. A quasi-judicial function stands mid-way between a judicial function and an administrative function. A *quasi-judicial decision is nearer the administrative decision in terms of its discretionary element and nearer the judicial decision in terms of procedure and objectivity of its end-product.*²⁸ (emphasis supplied)

It is also not true that in all quasi-judicial decisions, two characteristics are common, viz. (1) presentation of their case by the parties; and (2) the decision on questions of fact by means of evidence adduced by the parties. Firstly, in many cases, the first characteristic is absent and the authority may decide a matter not between two or more contesting parties but between itself and another party, e.g. an authority effecting compulsory acquisition of land. Here the authority itself is one of the parties and yet it decides the matter. It does not represent its case to any court or authority. Secondly, there may be cases in which no evidence is required to be taken and yet the authority has to determine the questions of fact after hearing the parties, e.g. rate-making or price-fixing. Thirdly, after ascertainment of facts, unlike a regular court, an authority is not bound to apply the law to the facts so ascertained, and the decision can be arrived at according to considerations of public policy or administrative discretion, which factors are unknown to an ordinary court of law.

9. QUASI-JUDICIAL FUNCTIONS DISTINGUISHED FROM JUDICIAL FUNCTIONS

A quasi-judicial function differs from a *purely* judicial function in the following respects:²⁹

- (i) A quasi-judicial authority has some of the trappings of a court, but not all of them; nevertheless there is an obligation to act judicially.

28. Griffith and Street: *Principles of Administrative Law*, 1973, p. 141.

29. Basu: *Administrative Law*, 1996, pp. 214-16.

- (ii) A *lis inter partes* is an essential characteristic of a judicial function, but this may not be true of a quasi-judicial function.
- (iii) A court is bound by the rules of evidence and procedure while a quasi-judicial authority is not.
- (iv) While a court is bound by precedents, a quasi-judicial authority is not.
- (v) A court cannot be a judge in its own cause (except in contempt cases), while an administrative authority vested with quasi-judicial powers may be a party to the controversy but can still decide it.

The distinction between judicial and quasi-judicial functions rests mainly on the fact that in deciding cases, courts apply pre-existing law whereas administrative authorities exercise discretion. This is, however, fallacious. "*The most that can be said is that the discretions of the courts may differ in nature and extent from the discretions of the administrator. Nevertheless, the asserted discretion is reduced to one of degree only.*"³⁰
(emphasis supplied)

10. ADMINISTRATIVE FUNCTIONS

In *Ram Jawaya v. State of Punjab*³¹, speaking for the Supreme Court, Mukherjea, C.J. observed: "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes *the residue of governmental functions that remain after legislative and judicial functions are taken away.*"³²
(emphasis supplied)

Thus, administrative functions are those functions which are neither legislative nor judicial in character. Generally, the following ingredients are present in administrative functions:

- (1) An administrative order is generally based on governmental policy or expediency.
- (2) In administrative decisions, there is no legal obligation to adopt a judicial approach to the questions to be decided, and the decisions are usually *subjective* rather than *objective*.

30. Benjafield and Whitmore: *Principles of Australian Administrative Law*, 1966, p. 105.

31. AIR 1955 SC 549; (1955) 2 SCR 225.

32. *Id.* at p. 555 (AIR). See also *Jayantilal v. Rana*, AIR 1964 SC 648 (655); (1964) 5 SCR 294; *Madhav Rao Scindia v. Union of India*, (1971) 1 SCC 85; AIR 1971 SC 530 (565); *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156; AIR 1986 SC 1571 (para 45).

- (3) An administrative authority is not bound by the rules of evidence and procedure unless the relevant statute specifically imposes such an obligation.
- (4) An administrative authority can take a decision in exercise of a statutory power or even in the absence of a statutory provision, provided such decision or act does not contravene provisions of any law.
- (5) Administrative functions may be delegated and sub-delegated unless there is a specific bar or prohibition in the statute.
- (6) While taking a decision, an administrative authority may not only consider the evidence adduced by the parties to the dispute, but may also use its discretion.
- (7) An administrative authority is not *always* bound by the principles of natural justice unless the statute casts such duty on the authority, either expressly or by necessary implication or if it is required to act judicially or fairly.
- (8) An administrative order may be held to be invalid on the ground of unreasonableness.
- (9) An administrative action will not become a quasi-judicial action merely because it has to be performed after forming an opinion as to the existence of any objective fact.
- (10) The prerogative writs of *certiorari* and prohibition are not *always* available against administrative actions.

11. ADMINISTRATIVE AND QUASI-JUDICIAL FUNCTIONS — DISTINCTION

(i) General

Acts of an administrative authority may be purely administrative or may be legislative or judicial in nature. Decisions which are purely administrative stand on a wholly different footing from judicial as well as quasi-judicial decisions and they must be distinguished. This is a very difficult task. "Where does the administrative end and the judicial begin? The problem here is one of demarcation and the courts are still in the process of working it out."³³

(ii) Object

With the increase of power of administrative authorities, it may be necessary to provide guidelines for the just exercise thereof. To prevent abuse of power and to see that it does not become a 'new despotism',

33. MacDermott, cited by Basu: *Commentary on the Constitution of India*, Vol. B, 1975, p. 151.

courts have evolved certain principles to be observed by adjudicating authorities.

(iii) *Lis*

To appreciate the distinction between administrative and quasi-judicial functions, we have to understand two expressions: (i) '*lis*', and (ii) '*quasi-lis*'.

In *Province of Bombay v. Khushaldas Advani*³⁴, Das, J. observed: "[I]f a statute empowers an authority ... to decide disputes arising out of a claim made by one party under the statute, which claim is opposed by another party and to determine the respective rights of the contesting parties, who are opposed to each other, there is a *lis*...."³⁵

One of the major grounds on which a function can be called 'quasi-judicial' as distinguished from pure '*administrative*' is when there is a *lis inter partes* and an administrative authority is required to decide the dispute between the parties and to adjudicate upon the *lis*. *Prima facie*, in such cases the authority will be regarded as acting in a quasi-judicial manner.

Certain administrative authorities have been held to be quasi-judicial authorities and their decisions regarded as quasi-judicial decisions, wherein such *lis* was present, e.g. a Rent Tribunal determining 'fair rent' between a landlord and his tenant,³⁶ an Election Tribunal deciding an election dispute between rival candidates,³⁷ an Industrial Tribunal deciding an industrial dispute,³⁸ a Licensing Tribunal granting a licence or permit to one of the applicants.³⁹

(iv) *Quasi-lis*

As discussed above, it is not in all cases that the administrative authority is to decide a *lis inter partes*. There may be cases in which an administrative authority decides a *lis* not between two or more contesting parties but between itself and another party. But there also, if the authority is empowered to take any decision which will prejudicially affect any person, such decision would be a quasi-judicial decision provided the authority is required to act judicially.

34. AIR 1950 SC 222: 1950 SCR 621.

35. *Id.* at p. 260 (AIR).

36. *R. v. Fulham Rent Tribunal*, (1950) 2 All ER 211.

37. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425: (1955) 2 SCR 1.

38. *Bharat Bank Ltd. v. Employees*, AIR 1950 SC 188: 1950 SCR 459.

39. *Raman & Raman v. State of Madras*, AIR 1959 SC 694: (1959) Supp (2) SCR 227; *Mahabir Prasad v. State of U.P.*, (1970) 1 SCC 764: AIR 1970 SC 1302.

Thus, where an authority makes an order granting legal aid,⁴⁰ dismissing an employee,⁴¹ refusing to grant, revoking, suspending or cancelling a licence,⁴² cancelling an examination result of a student for using unfair means,⁴³ rustication of a student,⁴⁴ etc. such decisions are quasi-judicial in character.

In all these cases there are no two parties before the administrative authority, 'and the other party to the dispute, if any, is the authority' itself. Yet, as the decision given by such authority adversely affects the rights of a person there is a situation resembling a *lis*. In such cases, the administrative authority has to decide the matter *objectively* after taking into account the objections of the party before it, and if such authority has exceeded or abused its powers, a writ of *certiorari* can be issued against it. Therefore, Lord Greene, M.R.⁴⁵ rightly calls it a '*quasi-lis*'.

(v) Duty to act judicially

The real test which distinguishes a quasi-judicial act from an administrative act is the *duty to act judicially*, and therefore, in considering whether a particular statutory authority is a quasi-judicial body or merely an administrative body, what has to be ascertained is whether the statutory authority has the duty to act judicially.

The question which may arise for our consideration is as to when this duty to act judicially arises. As observed by Parker, J. "the duty to act judicially may arise in widely different circumstances which it would be impossible, and indeed, inadvisable, to attempt to define exhaustively".⁴⁶

Whenever there is an express provision in the statute itself which requires the administrative authority to act judicially, the action of such authority would necessarily be a quasi-judicial function. But this proposition does not say much, for it is to some extent a tautology to say that the function is quasi-judicial (or judicial) if it is to be done judi-

40. *R. v. Manchester Legal Aid Committee*, (1952) 1 All ER 480: (1952) 2 QB 413.

41. *Ridge v. Baldwin*, 1964 AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935.

42. *Fedco Ltd. v. S.N. Bilgrami*, AIR 1960 SC 415: (1960) 2 SCR 408.

43. *Board of High School v. Ghanshyam*, AIR 1962 SC 1110; *Board of High School v. Kumari Chitra*, (1970) 1 SCC 121: AIR 1970 SC 1039.

44. *Suresh Koshy v. University of Kerala*, AIR 1969 SC 198; *Hira Nath Mishra v. Principal, Rajendra Medical College*, (1973) 1 SCC 805: AIR 1973 SC 1260.

45. *Johnson v. Minister of Health*, (1947) 2 All ER 395.

46. *R. v. Manchester Legal Aid Committee*, (1952) 1 All ER 480 (489): (1952) 2 QB 413.

cially.⁴⁷ Therefore, the real question is: Is it necessary that for an action to be quasi-judicial, the relevant statute must expressly require the administrative authority to act judicially?

Before we discuss this question, it will be necessary to quote the following observations of Atkin, L.J. in *R. v. Electricity Commissioners*⁴⁸, as subsequent development of law on this aspect is based on varying interpretations placed by subsequent cases thereon:

“Whenever any body of persons *having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially* act in excess of their legal authority, they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.”⁴⁹ (emphasis supplied)

In 1928, Lord Hewart, C.J.⁵⁰ read the aforesaid observations of Atkin, L.J. to mean that the duty to act judicially should be an additional requirement existing independently of the “authority to determine questions affecting the rights of the subjects” — something superadded to it. The gloss placed by Lord Hewart, C.J. on the dictum of Lord Atkin, L.J. was improper and it stultified the growth of the principles of natural justice. It has led to many anomalies and inequitable situations. In every case that came before it the court had to make a search for duty to act judicially in interpreting the provisions of the statute which resulted in confusion and uncertainty in law. But as Wade⁵¹ rightly says, in the correct analysis it was simply a corollary, the automatic consequence of the power ‘to determine questions affecting the rights of subjects’. Where there is any such power, there must be the duty to act judicially.

The law was finally settled in the historic case of *Ridge v. Baldwin*⁵², wherein Lord Reid pointed out how Hewart, C.J. misunderstood the observations of Atkin, L.J. and observed:

“If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of

47. Das, J. in *Province of Bombay v. Khushaldas Advani*, AIR 1950 SC 222: 1950 SCR 621.

48. (1924) 1 KB 171: 93 LJKB 390: 130 LT 164.

49. *Id.* at p. 205 (KB).

50. *R. v. Legislative Committee of the Church Assembly*, (1928) 1 KB 411 (415).

51. *Administrative Law*, 1994, p. 632.

52. (1964) AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935.

A-54073

natural justice, then that appears to me impossible to reconcile with the earlier authorities.”⁵³

Generally, statutes do not expressly provide for the duty to act judicially and, therefore, even in the absence of express provisions in the statutes the duty to act judicially should be inferred from “the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred, of the duty imposed on the authority and the other indicia afforded by the statute”.⁵⁴

(vi) Leading cases

Let us consider some leading cases to illustrate this proposition:

In *Nakkuda Ali v. Jayaratne*⁵⁵, the Controller of Textiles cancelled a licence of a textile dealer on the ground that the holder was unfit to continue as a dealer. Before passing the impugned order, he was not heard by the Controller. In an action against the Controller, the Privy Council held that the action by the Controller of cancellation of a licence was an executive action of withdrawal of privilege and the dealer had no right to hold the licence and the Controller was not under a duty to act judicially.

Similarly, in *R. v. Metropolitan Police Commissioner, ex p Parker*⁵⁶, a cab-driver's licence was revoked on the ground of alleged misconduct without giving reasonable opportunity to him to rebut the allegations made against him. The court upheld the order on the ground that the licence was merely a permission which could be revoked at any time by the grantor, and in doing so he was not required to act judicially.

But as Schwartz⁵⁷ says, for an individual to lose his licence is to suffer an ‘economic death sentence’ and is wholly contrary to the spirit of Anglo-American Administrative Law and this is an unwarranted restriction upon the application of the rules of natural justice. de Smith⁵⁸ also states: “Demolition of a property-owner's uninhabitable house might be for him a supportable misfortune; deprivation of a licence to trade might mean a calamitous loss of livelihood; but the judicial flavour detected in the former function was held to be absent from the latter.”

53. (1964) AC 40, 75; (1963) 2 All ER 66, 80.

54. Per Subba Rao, J. in *Dwarka Nath v. ITO*, AIR 1966 SC 81 (86).

55. (1951) AC 66 (78-79); 54 Cal WN 853.

56. (1953) 1 WLR 1150; (1953) 1 All ER 717.

57. *Administrative Law*, p. 115.

58. *Judicial Review of Administrative Action*, 1980, p. 172.

*Province of Bombay v. Khushaldas Advani*⁵⁹ was the first leading Indian decision on the point. Under Section 3 of the Bombay Land Requisition Ordinance, 1947, the Provincial Government was empowered to requisition any land for any public purpose "if in the opinion of the Government" it was necessary or expedient to do so. It was contended that the Government while deciding whether requisition was for a public purpose, had to act judicially. The High Court of Bombay upheld the said contention. Reversing the decision of the High Court, the Supreme Court held by a majority that the governmental function of requisitioning property was not quasi-judicial, for the decision was based on the *subjective satisfaction* of the Government and it was not required to act judicially.

In *Radheshyam v. State of M.P.*⁶⁰, the Supreme Court was called upon to consider the C.P. and Berar Municipalities Act, 1922, which contained two provisions. Section 53-A empowered the Government to supersede a municipality for a temporary period not exceeding 18 months for securing "a general improvement in the administration of the municipality", while Section 57 empowered the Government to suspend the municipality for an indefinite period for an incompetent or *ultra vires* action. Section 57 expressly provided for a reasonable opportunity to be given to the municipality before making an order, while Section 53-A did not contain such provision. The majority held that unlike Section 57, the power under Section 53-A was administrative in nature. Subba Rao, J. (as he then was) in a dissenting judgment held that the order under Section 53-A was also quasi-judicial in nature.

However, after the historic pronouncement of the House of Lords in *Ridge v. Baldwin*⁶¹, our Supreme Court has followed the ratio laid down therein. In *State of Orissa v. Binapani Dei*⁶², speaking for the Court, Shah, J. (as he then was) observed:

"Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed: it need not be shown to be superadded. *If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power.*"⁶³ (emphasis supplied)

59. AIR 1950 SC 222; 1950 SCR 621.

60. AIR 1959 SC 107; 1959 SCR 1440.

61. (1964) AC 40; (1963) 2 All ER 66; (1963) 2 WLR 935.

62. AIR 1967 SC 1269; (1967) 2 SCR 625.

63. *Id.* at p. 1271 (AIR).

Again, in *Maneka Gandhi v. Union of India*⁶⁴, the Court reiterated the said view and held that the duty to act judicially need not be super-added and it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected.

(vii) Test

No “dry and cut” formula to distinguish quasi-judicial functions from administrative functions can be laid down. The dividing line between the two powers is quite thin and being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of quasi-judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.⁶⁵

Whether a particular function is administrative or quasi-judicial must be determined in each case on an examination of the relevant statute and the rules framed thereunder and the decision depends upon the facts and circumstances of the case.⁶⁶

At one time prerogative remedies of *certiorari* and prohibition were confined to “judicial” functions pure and simple of public bodies. They both are now available in relation to functions which may be regarded as “administrative” or even “legislative”. As it is said, it is not the label that determines the exercise of jurisdiction of the court but the quality and attributes of the decision. “*On the whole the test of justiciability has replaced that of classification of function as a determinant of*

64. (1978) 1 SCC 248, 287; AIR 1978 SC 597, 672; see also *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262; AIR 1970 SC 150; *S.L. Kapoor v. Jagmohan*, (1980) 4 SCC 379; AIR 1981 SC 136.

65. *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262 (268-69); AIR 1970 SC 150 (154); *Tulsipur Sugar Co. Ltd. v. Notified Area Committee*, (1980) 2 SCC 295; AIR 1980 SC 882.

66. *Ibid*; see also *Nagendra Nath v. Commr., Hills Division*, AIR 1958 SC 398 (408).

the appropriateness of a decision for judicial review."⁶⁷

(emphasis supplied)

(viii) Quasi-judicial functions: Illustrations

The following functions are held to be quasi-judicial functions:⁶⁸

- (a) Disciplinary proceedings against students.
- (b) Dismissal of an employee on the ground of misconduct.
- (c) Confiscation of goods under the Sea Customs Act, 1878.
- (d) Cancellation, suspension, revocation or refusal to renew licence or permit by licensing authority.
- (e) Determination of citizenship.
- (f) Determination of statutory disputes.
- (g) Power to continue the detention or seizure of goods beyond a particular period.
- (h) Refusal to grant 'no objection' certificate under the Bombay Cinemas (Regulations) Act, 1953.
- (i) Forfeiture of pension or gratuity.
- (j) An order of assessment under a taxing statute.

(ix) Administrative functions: Illustrations

The following functions are held to be administrative functions:⁶⁹

- (a) An order of preventive detention.
- (b) An order of acquisition or requisition of property.
- (c) An order setting up a commission of inquiry.
- (d) An order making or refusing to make a reference under the Industrial Disputes Act, 1947.
- (e) An order granting sanction to prosecute a public servant.
- (f) An order granting or refusing to grant permission of sale in favour of non-agriculturist under Tenancy Acts.
- (g) An order of externment under the Bombay Police Act, 1951.
- (h) Power to issue licence or permit.
- (i) Entering names in Police register.
- (j) Withdrawal from prosecution.

67. de Smith: *Judicial Review of Administrative Action*, 1995, p. 1002.

68. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 59-60.

59. *Id.*, pp. 60-61.

12. ADMINISTRATIVE INSTRUCTIONS

Subject to the provisions of the Constitution, the Union and the States can exercise executive powers by issuing administrative instructions. Such administrative instructions are in the form of rules, regulations, notifications, etc. Broadly speaking, they have no statutory force and in *all* cases such administrative instructions may not confer a justiciable right which can be enforced in a court of law against the administration.⁷⁰ At the same time, it cannot be said that such administrative instructions *never* confer a justiciable right in favour of an aggrieved party. *It would be too wide a proposition of law.* There are certain administrative orders which confer rights and impose duties. If non-observance of non-statutory rule results in discrimination or arbitrariness, an aggrieved party can get relief from a competent court of law.⁷¹

70. *Fernandez v. State of Mysore*, AIR 1967 SC 1753; (1967) 3 SCR 636; *Kumari Regina v. A.H. Elementary School*, (1972) 4 SCC 188; AIR 1971 SC 1920; *Raghupathy v. State of A.P.*, (1988) 4 SCC 364; AIR 1988 SC 1681.

71. *Union of India v. Indo-Afghan Agencies*, AIR 1968 SC 718; (1968) 2 SCR 366; *Amarpit Singh v. State of Punjab*, (1975) 3 SCC 503; AIR 1975 SC 984; *Sukhdev Singh v. Bhagat Ram*, (1975) 1 SCC 421, 425; AIR 1975 SC 1331.

Lecture IV

**Delegated Legislation
(General Principles)**

It is sometimes said that Parliament makes the laws. It is true that Parliament makes the laws if by this we mean that Parliament has an essential role in the creation of Acts; but looking at the whole legislative process, it would perhaps be more realistic to say that the Government makes the laws subject to prior Parliamentary consent.

—GRIFFITH

The delegated legislation is so multitudinous that the statute book would not only be incomplete but misleading unless it be read along with the delegated legislation which amplifies and amends it.

—SIR CECIL CARR

'Delegated legislation' is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists.

—JUSTICE MUKHERJEA

SYNOPSIS

1. General
2. Definition
3. Reasons for growth of delegated legislation
 - (a) Pressure upon Parliamentary time
 - (b) Technicality
 - (c) Flexibility
 - (d) Experiment
 - (e) Emergency
 - (f) Complexity of modern administration
4. Forms of delegated legislation
5. Delegated legislation in England
6. Delegated legislation in U.S.A.
 - (a) In theory
 - (b) In practice
 - (c) Conclusions
7. Delegated legislation in India
 - (a) Pre-Constitution period
 - (b) Post-Constitution period
8. Excessive delegation
 - (a) General
 - (b) Nature and scope

- (c) Abdication
- (d) Principles
- (e) Test
- (f) Powers and duties of courts
- (g) Conclusions
- 9. Functions which can be delegated (Permissible Delegation)
- 10. Functions which cannot be delegated (Impermissible Delegation)
- 11. Delegation in favour of local authorities
 - (a) General
 - (b) Nature and scope
 - (c) Object
 - (d) Judicial approach
 - (e) Limitations
 - (f) Principles
 - (g) Conclusions
- 12. Taxing statutes
- 13. Conditional legislation
 - (a) Definition
 - (b) Nature and scope
 - (c) Illustrative cases
 - (d) Conditional Legislation and Delegated Legislation: Distinction
 - (e) Conclusions
- 14. Sub-delegation
 - (a) Definition
 - (b) Illustration
 - (c) Object
 - (d) Express power
 - (e) Implied power
 - (f) Criticism
 - (g) Conclusions
- 15. General principles

1. GENERAL

According to the traditional theory, the function of the executive is to administer the law enacted by the legislature, and in the ideal State, the legislative power must be exercised exclusively by the legislators who are directly responsible to the electorate. But, as observed in the previous lecture, as a matter of fact, apart from 'pure' administrative functions, the executive performs many legislative and judicial functions also. In England, theoretically it is only Parliament which can make laws. Looking to the legislative process, however, it is really the Government which makes the laws subject to parliamentary control.¹ Even in the United States of America where the doctrine of delegated legislation has

1. *Committee on Ministers' Power Report*, 1932, p. 33.

not been accepted in principle, in practice the legislature has entrusted legislative powers to the executive. Due to a number of reasons, particularly after two world wars, there is rapid growth of administrative legislation. In India, during 1973 to 1977, Parliament enacted about 300 statutes, but total number of statutory rules and orders reached more than 25,000.² In this lecture, we shall consider the legislative and quasi-legislative functions performed by the executive.

2. DEFINITION

It is very difficult to give any precise definition of the expression '*delegated legislation*'. It is equally difficult to state with certainty the scope of such delegated legislation. Mukherjea, J.³ rightly says:

"Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists...."

The simple meaning of the expression '*delegated legislation*' may be given as under:

"When the function of legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is called delegated legislation."

According to M.P. Jain⁴, the term '*delegated legislation*' is used in two senses: it may mean (a) exercise by a subordinate agency of the legislative power delegated to it by the legislature, or (b) the subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature.

In its first application, it means that the authority making the legislation is subordinate to the legislature. The legislative powers are exercised by an authority other than the legislature in exercise of the powers delegated or conferred on them by the legislature itself. This is also known as '*subordinate legislation*', because the powers of the authority which makes it are limited by the statute which conferred the power and consequently, it is valid only insofar as it keeps within those limits.⁵

In its second connotation, '*delegated legislation*' means and includes all rules, regulations, bye-laws, orders, etc. Thus, the object of the Minimum Wages Act, 1948 is "to provide for fixing minimum wages in

2. Prof. Upendra Baxi, cited in *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137(160); AIR 1979 SC 321(336).

3. Quoted by Chakraverti: *Administrative Law*, 1970, p. 166.

4. *Treatise on Administrative Law*, 1996, Vol. 1, p. 51; see also Yardley: *A Source Book of English Administrative Law*, 1970, p. 36.

5. Basu: *Administrative Law*, 1996, p. 65.

certain employments''. The Act applies to employments mentioned in the Schedule. But the Central Government (executive) is empowered to add any other employment to the Schedule if, 'in the opinion of the Government' the Act should apply.

The Essential Commodities Act, 1955 enumerates certain commodities as 'essential commodities' under the Act. But the list given in the statute is not exhaustive and the Central Government is empowered to declare any other commodity as 'essential commodity' and to apply the provisions of the Act to it.

The Payment of Bonus Act, 1965 empowers the Central Government to exempt any establishment or a class of establishments from the operation of the Act, having regard to the financial position and other relevant considerations.

The Defence of India Act, 1962 authorized the Central Government to make "such rules as appear to it to be necessary or expedient" for the defence of India and maintenance of public order and safety.

The Income Tax Act, 1961 empowers the Board to make rules "for carrying out the purposes of the Act and for the ascertainment and determination of any class of income".

The statute enacted by the legislature conferring the legislative power upon the executive is known as the 'parent Act' or 'primary law', and the rules, regulations, bye-laws, orders, etc. made by the executive in pursuance of the legislative powers conferred by the legislature are known as subordinate laws or subsidiary laws or the 'child legislation'.

3. REASONS FOR GROWTH OF DELEGATED LEGISLATION

Many factors are responsible for the rapid growth of delegated legislation in every modern democratic State. The traditional theory of '*laissez faire*' has been given up by every State and the old 'police State' has now become a 'welfare State'. Because of this radical change in the philosophy as to the role to be played by the State, its functions have increased. Consequently, delegated legislation has become essential and inevitable. As the American lawyer and statesman Root remarks: "The old doctrine prohibiting the delegation of legislative powers has virtually retired from the field and given up the fight". According to the Committee on Ministers' Powers, "it would be impossible to produce the amount and the kind of legislation which Parliament desires to pass and which the people of this country are supposed to want, if it became necessary to insert in the Acts of Parliament themselves any considerable

portion of what is now left to delegated legislation.”⁶ In the opinion of the Committee, the factors responsible for the growth of delegated legislation are⁷:

(a) Pressure upon Parliamentary time

As a result of the expanding horizons of State activity, the bulk of legislation is so great that it is not possible for the legislature to devote sufficient time to discuss all the matters in detail. Therefore, legislature formulates the general policy — the skeleton — and empowers the executive to fill in the details — ‘thus giving flesh and blood to the skeleton so that it may live’⁸ — by issuing necessary rules, regulations, bye-laws, etc. In the words of Sir Cecil Carr⁹, delegated legislation is “a growing child called upon to relieve the parent of the strain of overwork and capable of attending to minor matters, while the parent manages the main business”. If the 525 parliamentarians are to focus on every minuscule legislative detail leaving nothing to subordinate agencies the annual output may be both unsatisfactory and negligible.¹⁰ The Committee on Ministers’ Powers has rightly observed:

“The truth is, that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass *the kind and quality of legislation which modern public opinion requires.*”

(emphasis supplied)

(b) Technicality

Sometimes, the subject-matter on which legislation is required is so technical in nature that the legislator, being himself a common man, cannot be expected to appreciate and legislate on the same, and the assistance of experts may be required. Members of Parliament may be the best politicians but they are not experts to deal with highly-technical matters which are required to be handled by experts. Here the legislative power may be conferred on experts to deal with the technical problems, e.g. gas, atomic energy, drugs, electricity, etc.

6. Cited in *Municipal Corpn., Delhi v. Birla Cotton Mills*, AIR 1968 SC 1232 at p. 1252.

7. See *Delhi Laws Act, 1912; Re*, AIR 1951 SC 332; 1951 SCR 747; *Municipal Corpn., Delhi v. Birla Cotton Mills*, AIR 1968 SC 1232; (1968) 3 SCR 251; *Gwalior Rayon Silk Mfg. Co. v. Asstt. Commr. of Sales Tax*, (1974) 4 SCC 98; AIR 1974 SC 1660; *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137; AIR 1979 SC 321; *Ramesh Birch v. Union of India*, 1989 Supp (1) SCC 430; AIR 1990 SC 560.

8. Garner: *Administrative Law*, 1985, p. 49.

9. *Delegated Legislation*, 1921, p. 2.

10. *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137; AIR 1979 SC 321.

(c) Flexibility

At the time of passing any legislative enactment, it is impossible to foresee all the contingencies, and some provision is required to be made for these unforeseen situations demanding exigent action. A legislative amendment is a slow and cumbersome process, but by the device of delegated legislation, the executive can meet the situation expeditiously, e.g. bank-rate, police regulations, export and import, foreign exchange, etc. For that purpose, in many statutes, a 'removal of difficulty' clause is found empowering the administration to overcome difficulties by exercising delegated power.

(d) Experiment

The practice of delegated legislation enables the executive to experiment. This method permits rapid utilisation of experience and implementation of necessary changes in application of the provisions in the light of such experience, e.g. in road traffic matters, an experiment may be conducted and in the light of its application necessary changes could be made.

(e) Emergency

In times of emergency, quick action is required to be taken. The legislative process is not equipped to provide for urgent solution to meet the situation. Delegated legislation is the only convenient — indeed the only possible — remedy. Therefore, in times of war and other national emergencies, the executive is vested with special and extremely wide powers to deal with the situation. There was substantial growth of delegated legislation during the two world wars. Similarly, in situation of epidemics, floods, inflation, economic depression, etc. immediate remedial actions are necessary which may not be possible by lengthy legislative process and delegated legislation is the only convenient remedy.

(f) Complexity of modern administration

The complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. By resorting to traditional legislative process, the entire object may be frustrated by vested interests and the goal of control and regulation over private trade and business may not be achieved at all.

"However one might deplore the 'New Despotism' of the Executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely

necessary for the Legislatures to entrust more and more powers to the Executive. *Textbook doctrines evolved in the 19th century have become out of date*".¹¹ (emphasis supplied).

There has, therefore, been rapid growth of delegated legislation in all countries and it has become indispensable in the modern administrative era.

4. FORMS OF DELEGATED LEGISLATION

Delegated legislation may take several forms. They may be normal or of exceptional type; they may be usual or unusual; positive or negative; skeleton or Henry VIII clause. Broadly speaking, delegated legislation may be classified on the following principles;¹²

(i) Title-based classification

Delegated legislation may be in the forms of Rules, Regulations, Bye-laws, Notifications, Schemes, Orders, Ordinances, Directions, etc.

(ii) Discretion-based classification

A discretion may be conferred on the executive to bring the Act into operation on fulfilment of certain conditions. Such legislation is called "conditional" or "contingent" legislation.

(iii) Purpose-based classification

A classification may be based on nature and extent of power conferred and purposes for which such power can be exercised. Thus, executive can be empowered to fix appointed day for the Act to come into force, to supply details, to extend the provisions of the Act to other areas, to include or to exclude operation of the Act to certain territories, persons, industries, commodities, to suspend or to modify the provisions of the Act, etc.

(iv) Authority-based classification

A statute may also empower the executive to delegate further powers conferred on it to its subordinate authority. This is known as "sub-delegation".

5. DELEGATED LEGISLATION IN ENGLAND

In England, Parliament is sovereign. In principle, it is only Parliament which can enact laws. But as observed by C.K. Allen: "Nothing is more

11. *Sita Ram v. State of U.P.*, (1972) 4 SCC 485(487); AIR 1972 SC 1168(1169).

12. Wade: *Administrative Law*, 1994, p. 867; Benjafield and Whitmore: *Australian Administrative Law*, 1966, p. 116; M.P. Jain: *Treatise on Administrative Law*, 1996, p. 67; Massey: *Administrative Law*, 1995, p. 67.

striking in the legal and social history of the nineteenth century in England than the development of subordinate legislation.¹³

Maitland also said: "Year by year the subordinate Government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832: it has gone far already and assuredly it will go farther. *We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.*"¹⁴ (emphasis supplied)

The reasons for growth of delegated legislation in other countries were equally responsible for the development of delegated legislation in England. Parliament had no time to deal with various matters in detail. Complexity, technicality, emergency and expediency compelled Parliament to delegate its 'legislative office' to government.

Traditionally, administrative legislation was looked upon as an evil, but gradually it came to be regarded as justifiable in principle also. It was realised that legislation and administration were not two fundamentally different forms of power. Tests formulated to distinguish legislative and administrative functions proved insufficient and inappropriate.¹⁵

But at the same time, administrative law had not been accepted as a developed and recognised branch of law. Taylor, therefore, observed: "Until August, 1914 a sensible law abiding Englishman could pass through life and hardly notice the existence of the State, beyond the post office and the policeman".¹⁶

During two world wars, there was tremendous increase in delegated legislation. In various fields massive inroads were made in comparatively personal matters of citizens, e.g. housing, education, employment, pension, health, planning, production, preservation and distribution of essential commodities, social security, etc. In twentieth century, Parliament was obliged to delegate extensive law-making power in favour of Government. A hue and cry was raised against the growth of delegated legislation. The matter was, therefore, referred to the Committee on Ministers' Powers (Donoughmore Committee) in 1929. The Committee submitted its report in 1932. It observed, "We doubt, whether Parliament itself has

13. *Law in the Making*, (1993), p. 531.

14. *Constitutional History of England*, p. 501, cited by C.K. Allen.

15. Wade: *Administrative Law*, 1994, pp. 859-60. For distinction between legislative and administrative functions, see Lecture III, *supra*.

16. *English History (1914-1945)*, p. 1; see also Committee on Ministers' Powers Report, 1932, p. 5; Wade: *Administrative Law*, 1994, p. 4.

fully realised how extensive the practice of delegated legislation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused."¹⁷

The Committee rightly stated;

"The system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits, and under certain safeguards."¹⁸

6. DELEGATED LEGISLATION IN U.S.A.

(a) In theory

Under the Constitution of the United States of America, delegated legislation is not accepted in theory because of two doctrines:

(i) *Separation of powers*

This doctrine is accepted under the Constitution of the U.S.A. and by Article I, legislative power is expressly conferred on the Congress and the judiciary has power to interpret the Constitution and declare any statute unconstitutional if it does not conform to the provisions of the Constitution. In the leading case of *Field v. Clark*¹⁹, the American Supreme Court observed:

"That Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of Government ordained by the Constitution."²⁰

(ii) *Delegatus non potest delegare* (A delegate cannot further delegate)

According to this doctrine, a delegate cannot further delegate his power. As the Congress gets power from the people and is a delegate of the people in that sense, it cannot further delegate its legislative power to the executive or to any other agency. A power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence, it is a cardinal principle of representative Government, that the legislature cannot delegate the power to make laws to any other body or authority.²¹

17. Committee on Ministers' Powers Report, 1932, p. 62.

18. Committee on Ministers' Powers Report, 1932, p. 51.

19. (1892) 143 US 649.

20. *Id.* at p. 692.

21. *Pennsylvania case*, (1873) 71 Locke's Appeal 491(497).

(b) In practice

Though, in theory, it was not possible for the Congress to delegate its legislative power to the executive, strict adherence thereto was not practicable. Governmental functions had increased and it was impossible for the Congress to enact all the statutes with all particulars. The Supreme Court could not shut its eyes to this reality and tried to create 'a balance between the two conflicting forces: doctrine of separation of powers barring delegation and the inevitability of delegation due to the exigencies of the modern Government'.²²

In *Panama Refining Co. v. Ryan*²³, popularly known as the *Hot Oil case*, under Section 9(c) of the National Industrial Recovery Act (NIRA), 1933, the President was authorised by the Congress to prohibit transportation of oil in inter-State commerce in excess of the quota fixed by the State concerned. The policy of the Act was 'to encourage national industrial recovery' and 'to foster fair competition'. The Supreme Court by majority held that the delegation was invalid. According to the Court the Congress had not declared any legislative policy or standard.

In *Schechter Poultry Corp. v. U.S.*²⁴ (*Sick Chicken case*), the Supreme Court unanimously struck down Section 3 of the National Industrial Recovery Act (NIRA), 1933 which authorised the President to approve codes of fair competition and violation thereof was made punishable. The Court held that the discretion of the President was 'virtually unfettered'.²⁵

After the above two cases, however, the Supreme Court took a liberal view and in many cases, upheld delegation of legislative power. Thus in *National Broadcasting Co. v. U.S.*²⁶, vast powers were conferred upon the Federal Communication Committee (FCC) to licence broadcasting stations under the Communications Act, 1934. The criterion was 'public interest, convenience or necessity'. Though it was vague and ambiguous the Supreme Court held it to be a valid standard. Similarly, in *Yakus v. U.S.*²⁷, under the Emergency Price Control Act, 1942, the Price Administrator was given the power to fix such maximum price which "in his judgment will be generally fair and equitable and will effectuate the purposes of the Act". The Administrator was required, so far as practicable,

22. *ILI: Cases and Materials on Administrative Law in India*, 1966, Vol. I, pp. 188-89.

23. (1934) 293 US 388.

24. (1935) 295 US 495; 79 L Ed 1570.

25. *Id.* at pp. 541-42.

26. (1943) 319 US 190.

27. (1944) 321 US 414.

to give due consideration to the prices prevailing between October 1 and October 15, 1941, but was allowed to consider a later date if necessary data were not available, and yet the Supreme Court sustained the delegation, holding that the standards were adequate. Justice Roberts (minority view) rightly observed that by the majority judgment, *Schechter* (*supra*) was overruled. Again, in *Litcher v. U.S.*²⁸, the Reorganisation Act, 1942, empowered Administrative Officers to determine whether the prices were excessive and to recover profits which they determined to be excessive. The Supreme Court held the delegation valid observing that the statutory term 'excessive profits' was a sufficient expression of legislative policy and standards to render it constitutional.

Davis²⁹ maintains that 'greatest delegation' was sanctioned by the Supreme Court as the "judicial language about standard was artificial". According to him, the definition of 'excessive profits' was given as '*excessive means excessive*'.

(c) Conclusions

From the above discussion, it clearly emerges that the traditional theory has been given up and the Supreme Court has also adopted a liberal approach. Thus, 'pragmatic considerations have prevailed over theoretical objections'.³⁰ Schwartz rightly says: "If the standards such as those contained in the Reorganisation and Communications Acts are upheld as adequate, it becomes apparent that the requirement of standards has become more a matter of form than substance."³⁰ I must quote here a well-known syllogism of Prof. Cushman:

MAJOR PREMISE	:	Legislative power cannot be constitutionally delegated by Congress.
MINOR PREMISE	:	It is essential that certain powers be delegated to administrative officers and regulatory commissions.
CONCLUSION	:	Therefore, the powers thus delegated are not legislative powers.

7. DELEGATED LEGISLATION IN INDIA

The discussion can be divided into two stages—

- (a) pre-Constitution period; and
- (b) post-Constitution period.

28. (1947) 334 US 742.

29. *Administrative Law*, 1951, pp. 45-54.

30. Schwartz: *An Introduction to American Administrative Law*, 1984, p. 47.

(a) Pre-Constitution period

*Queen v. Burah*³¹ is considered to be the leading authority on the subject. By Act XXII of 1869, Garo Hills was removed from the jurisdiction of civil and criminal courts, and by Section 9, the Lieutenant-Governor was empowered to extend *mutatis mutandis* all or any of the provisions of the Act applicable to Khasi, Jaintia and Naga Hills in the Garo Hills and to fix the date of such application. By a notification dated October 14, 1871, the Lieutenant-Governor extended all the provisions of the Act to the District of Khasi and Jaintia Hills. The appellants who were convicted of murder and sentenced to death, challenged the notification.

The High Court of Calcutta³², by a majority upheld the contention of the appellants and held that Section 9 of the Act was *ultra vires* the powers of the Indian Legislature. According to the Court, the Indian Legislature was a delegate of the Imperial Parliament and, therefore, further delegation was not permissible.

On appeal, the Privy Council reversed the decision of the Calcutta High Court. It held that the Indian Legislature was not an agent or delegate of the Imperial Parliament and it had plenary powers of legislation as those of the Imperial Parliament itself. It agreed that the Governor-General in Council could not, by legislation, create a new legislative power in India not created or authorised by the Council's Act. But in fact it was not done. It was only a case of conditional legislation, as the Governor was not authorised to pass new laws, but merely to extend the provisions of the Act already passed by the competent legislature upon fulfilment of certain conditions.

In *Jatindra Nath Gupta v. Province of Bihar*³³, the Bihar Maintenance of Public Order Act, 1948 was to remain in force for one year. However, the power was conferred on the Provincial Government to extend the operation of the Act for a further period of one year. By a majority, the Federal Court held that the power to extend the operation of the Act beyond the period of one year was a legislative act, and therefore, could not be delegated. However, in a dissenting judgment, Fazl Ali, J.³⁴ upheld the provision as the extension of the Act, for a further period of one year could not amount to its re-enactment. It merely

31. (1878) 3 AC 889; (1878) 5 IA 178; ILR 4 Cal 172 (PC).

32. *Empress v. Burah and Book Singh*, ILR 3 Cal 64; 1 CLR 161 (FB).

33. AIR 1949 FC 175; 1949 FCR 595.

34. *Id.* at p. 194 (AIR).

mounted to a continuance of the Act for which the maximum period was contemplated by the legislature itself.

It is submitted that the minority view was correct and subsequently in *Inder Singh v. State of Rajasthan*³⁵ the Supreme Court upheld the similar provision.

b) Post-Constitution period

*Delhi Laws Act, 1912, Re*³⁶ is the first leading case decided by the Supreme Court on delegated legislation after the Constitution of India came into force. A reference was made to the Supreme Court by the President of India under Article 143 of the Constitution in the following circumstances:

The Central Government was authorised by Section 2 of the "Part 'C' States" (Laws) Act, 1950 to extend to any "Part 'C' State" with such modifications and restrictions as it thinks fit, any enactment in force in a "Part 'A' State"; and while doing so, it could repeal or amend any corresponding law (other than a Central Act) which might be in force in the "Part 'C' State".

The Supreme Court was called upon to decide the legality of the aforesaid provision. All the seven judges who heard the reference gave their separate answers 'exhibiting a cleavage of judicial opinion' on the question of limits to which the legislature in India should be permitted to delegate its legislative power. The majority held the provision valid subject to two limitations—

- (i) the executive cannot be authorised to repeal a law in force and thus, the provision which empowered the Central Government to repeal a law already in force in the Part C State was bad; and
- (ii) by exercising the power of modification, the legislative policy should not be changed; and thus, before applying any law to the Part C State, the Central Government cannot change the legislative policy.

The importance of the *Delhi Laws Act case* cannot be under-estimated inasmuch as, on the one hand, it permitted delegation of legislative power by the legislature to the executive; while on the other hand, it demarcated the extent of such permissible delegation of power by the Legislature.

35. AIR 1957 SC 510: 1957 SCR 605; see also Lecture V, *infra*.

36. AIR 1951 SC 332: 1951 SCR 747.

Principle laid down in Delhi Laws Act case — As stated above, all the seven judges gave their separate opinions. Many a time a question is asked as to whether any principle was laid down by the majority opinion. There is difference of opinion amongst jurists regarding this.

According to Patanjali Sastri, C.J.³⁷, 'undoubtedly, certain definite conclusions were reached by the majority of the judges, it is difficult to say that any particular principle was laid down, which can be of assistance in the determination of other cases'. Seervai³⁸ is also of the same opinion.

On the other hand, Bose, J.³⁹ and Basu⁴⁰ are of the opinion that in spite of separate opinions, certain principles have been laid down by the Supreme Court in *Delhi Laws Act case*. M.P. Jain⁴¹ is right when he states that on two points there was similarity in the outlook evidenced in the opinions. First, keeping the exigencies of the modern Government in view, Parliament and the State legislatures in India need to delegate legislative power if they are to be able to face the multitudinous problems facing the country, for it is neither practicable nor feasible to expect that each of the legislative bodies could turn out complete and comprehensive legislation on all subjects sought to be legislated upon. Second, since the legislatures derive their powers from the written Constitution which creates them, they could not be allowed the same freedom as the British Parliament in the matter of delegation; some limits should be set on their capacity to delegate. The major difficulty was, and it was on this point that the Judges differed, where to set the limit, where to draw the line, what were to be the permissible contours within which an Indian legislature could delegate its legislative power?

In *Harishankar Bagla v. State of M.P.*⁴², under Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, the Central Government was empowered to issue an order for the regulation of production, distribution, etc. of essential commodities and by Section 6 it was provided that "an order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act". Both the sections were challenged on the ground of excessive delegation of legislative power. The Supreme Court held that the object

37. *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123: 1952 SCR 435.

38. *Constitutional Law of India*, 1976, Vol. II, p. 1196.

39. *Rajnarain Singh v. Patna Admn. Committee*, AIR 1954 SC 569: (1955) 1 SCR 290.

40. *Commentaries on the Constitution of India*, Vol. IV, p. 141.

41. *Treatise on Administrative Law*, 1996, Vol. I, p. 62.

42. AIR 1954 SC 465: (1955) 1 SCR 380.

f Section 6 was not to repeal or abrogate any existing law, but to bypass the same where the provisions thereof were inconsistent with the provisions of the Act. The court also held that the legislative policy was laid down in the Act and, therefore, there was no excessive delegation. Thus, in fact, every broad delegation of legislative power was judicially sanctioned.

Similarly, in *Edward Mills v. State of Ajmer*⁴³, the Schedule to the Minimum Wages Act, 1948, contained a list of industries to which the Act was made applicable by Parliament, but the appropriate Government was authorised to add any other industry to the said Schedule. The matter of application of the provisions of the Act to any industry was left to the 'opinion of the Government' but no norms were laid down for the exercise of such discretion and yet, the Supreme Court upheld the validity of the Act. According to the Court, the legislative policy was apparent on the face of the Act to fix minimum wages to avoid the chance of exploitation of labour. But 'the test for selecting industries to be included in the Schedule, which the court propounded, was nowhere mentioned in the Act but was formulated by the Court itself to uphold the Act'.⁴⁴

After the *Delhi Laws Act case*, *Hamdard Dawakhana v. Union of India*⁴⁵ was probably the first case in which a Central Act was held *ultra vires* on the ground of excessive delegation. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was enacted by Parliament to control advertisement of certain drugs. Section 3 laid down a list of diseases for which advertisement was prohibited and authorised the Central Government to include any other disease in the list. The Supreme Court held section 3 invalid as no criteria, standards or principles had been laid down therein, and the power delegated was unguided and uncontrolled.

It is submitted that the view taken by the Supreme Court was erroneous inasmuch as, the legislative policy had been laid down in the preamble and title of the Act. Certain diseases had been mentioned and the Government was empowered to include and to bring within its purview *any other disease*'. There is nothing objectionable in such a provision and prior to this case as well as in subsequent cases, such a provision has been held valid by the Court in a number of cases.⁴⁶ It is not necess-

43. AIR 1955 SC 25; (1955) 1 SCR 735.

44. M.P. Jain: *Indian Constitutional Law*, 1987, p. 78.

45. AIR 1960 SC 554; (1960) 2 SCR 671.

46. *Edward Mills v. State of Ajmer*, AIR 1955 SC 25; *Banarsi Das v. State of M.P.*, AIR 1958 SC 909; 1959 SCR 427; *Sable v. Union of India*, (1975) 1 SCC 763; AIR 1975 SC 1172; *Babu Ram v. State of Punjab*, (1979) 3 SCC 616; AIR 1979 SC 1475; *Brij Sunder v. First Addl. District Judge*, (1989) 1 SCC 561; AIR 1989 SC 572.

ary that the legislature should "dot all the i's and cross all the t's" of its policy.⁴⁷

In *Gwalior Rayon Silk Mfg. Co. v. Asstt. Commr.*⁴⁸, under Section 8(2)(b) of the Central Sales Tax Act, 1956, Parliament did not fix the rate of Central Sales Tax but adopted the rate applicable to the sale or purchase of goods within the appropriate State in case such rate exceed 10 per cent. The said section was challenged on the ground that Parliament in not fixing the rate itself and in adopting the rate applicable within the appropriate State has not laid down any legislative policy and has abdicated its legislative function.

The section was upheld by all the five judges⁴⁹, holding that sufficient guideline was provided in the Act by Parliament. But this case is noteworthy for two diverse approaches adopted by Khanna, J. (for three judges) and Mathew, J. (for two judges) in respect of the following contention.

On behalf of the Sales Tax Department, a pre-emptive argument was put forward that while conferring power upon a delegate to make subordinate legislation, the legislature need not disclose any policy, principle or standard because if the legislature can repeal an enactment, as it normally can, it retains sufficient control over the authority making the subordinate legislation.

Khanna, J. (for himself, Alagiriswami and Bhagwati, JJ.) rejected the argument and reiterated that the legislature must lay down a policy principle or standard for the guidance of the delegate. The rule against excessive delegation of legislative authority flows from the sovereignty of the people. The rule contemplates that it is not permissible to substitute, in the matter of legislative policy, the view of individual officer or other authorities, however competent they may be, for that of the popular will as expressed by the representatives of the people. The acceptance of the view canvassed by the department would lead to startling results. If Parliament were to enact that as the crime situation in the country has deteriorated, criminal law to be enforced in the country would be such as is framed by an officer mentioned in the enactment can it be said that there has been no excessive delegation of legislative power? To say that if Parliament does not approve the law made by the officer concerned, it can repeal the same or the parent Act is no answer.

47. *Ramesh Birch v. Union of India*, 1989 Supp (1) SCC 430 (471): AIR 1990 S 560.

48. (1974) 4 SCC 98: AIR 1974 SC 1660.

49. Ray, C.J., Khanna, Mathew, Alagiriswami and Bhagwati, JJ.

The delegating section was, however, held valid on the ground that the Act was plainly enacted with a view to prevent evasion of the payment of central sales tax.

The concurring judgment of Mathew, J. (for himself and Ray, C.J.) accepted the said argument and observed that delegation involves the granting of discretionary power to another, but the ultimate power always remains with the legislature. What is prohibited is abdication, i.e. conferment of arbitrary power by the legislature upon a subordinate body without reserving to itself control over that body. Relying upon the decisions in *Queen v. Burah*⁵⁰ and *Cobb v. Kropp*⁵¹, Mathew, J. observed that a legislature cannot be said to abdicate its legislative function if it could at any time repeal the legislation and withdraw the authority and discretion it had vested in the delegate.

Without referring to the majority or minority judgment in *Gwalior Rayon*, Mathew, J. reiterated his views in *M.K. Papiiah v. Excise Commissioner*⁵². Section 22 of the Karnataka Excise Act, 1966 conferred on the Government a power to fix the rates of excise duty and Section 71 empowered the Government to make rules. Rules made under the Act were to be laid before the State legislature as soon as practicable after they had been made. Both the sections were challenged on the ground of impermissible delegation of legislative power. Mathew, J. speaking for a unanimous Court of three judges observed that the laying of the rules before the legislature was a sufficient check on the power conferred on the delegate. The petitioners thereupon argued that the rules would come into force as soon as they were framed and that the power of the legislature to repeal rules subsequently could not be regarded as sufficient control over delegated legislation. Rejecting this argument, Mathew, J. observed that considering the compulsions and complexities of modern life such control must be regarded as sufficient.

Welcoming this departure, Seervai⁵³ says that the unanimous judgment in *Papiiah* shows that 'after twenty-five years of wandering in the legal maze of its own creation, the Supreme Court of India, like the Supreme Court of the United States has come round to the view expressed by the Privy Council in 1878'.⁵⁴

50. (1878) 3 AC 889; (1878) 5 IA 178 (PC).

51. (1867) AC 141 (PC).

52. (1975) 1 SCC 492; AIR 1975 SC 1007.

53. *Constitutional Law of India*, 1976, Vol. II, pp. 1204-05.

54. *Queen v. Burah*, (1878) 3 AC 889; (1878) 5 IA 178 (PC).

Seervai's enthusiasm has, however, turned out to be short-lived for in *Kerala State Electricity Board v. Indian Aluminium Co.*⁵⁵ once again, a Bench of five Judges of the Supreme Court reiterated the majority view of *Gwalior Rayon*.

In *Shama Rao v. Union Territory of Pondicherry*⁵⁶, by enacting the Pondicherry General Sales Tax Act, 1965, the Pondicherry Legislature adopted the Madras Sales Tax Act, 1959, as in force in the State of Madras immediately before the commencement of the Act in Pondicherry. The Government was empowered to issue notification of commencement of the Act in Pondicherry. The effect of the said provision was that all the amendments in the Madras Act during the period of enactment and commencement of the Pondicherry Act *ipso facto* became applicable to the Union Territory of Pondicherry. Holding the Pondicherry Act void and stillborn, the Supreme Court by a majority of 3: 2⁵⁷ observed that there was total surrender, abdication and effacement of legislative power by the Pondicherry Legislature in favour of the Madras Legislature.

In *Brij Sunder v. First Addl. District Judge*⁵⁸, almost a similar provision was held to be valid by the Court. Distinguishing *Shama Rao* (*supra*) and following *Delhi Laws Act, 1912* the Court observed:

“[T]he delegation of power to extend even future laws of another State will not be bad so long as, in the process and under the guise of alteration and modification, an alteration of the essential character of the law or a change of it in essential particulars is not permitted.”⁵⁹

8. EXCESSIVE DELEGATION

(a) General

It is well settled that essential and primary legislative functions must be performed by the legislature itself and they cannot be delegated to the executive. Essential legislative functions consist of determination of legislative policy and its formulation as a rule of conduct. In other words, a legislature has to discharge the primary duty entrusted to it. Once es-

55. (1976) 1 SCC 466: AIR 1976 SC 1031. For critical discussion of conflicting decisions of the Supreme Court, see C.K. Thakker: *Administrative Law*, 1996, pp. 79-81.

56. AIR 1967 SC 1480: (1967) 2 SCR 650.

57. Subba Rao, C.J., Shelat and Mitter, JJ. (Shah and Bhargava, JJ. contra.); see also *Parasuraman v. State of T.N.*, (1989) 4 SCC 483: AIR 1990 SC 40.

58. (1989) 1 SCC 561: AIR 1989 SC 572.

59. *Id.*, at p. 582 (SCC): 587 (AIR).

essential legislative powers are exercised by the legislature, all ancillary and incidental functions can be delegated to the executive.⁶⁰

(b) Nature and scope

It has been accepted that Parliament does not possess the legislative power as an inherent and original power. That power has been delegated to it by the Constitution. Parliament thus possesses not a right that it can delegate at its sweet will, but a competence that the Constitution obliges it to exercise itself. It cannot legally delegate its legislative functions to the executive. Such delegation would be unconstitutional.⁶¹

In Great Britain, excessive delegations of parliamentary powers are political concerns, in the United States (and in India), they are primarily judicial.

(c) Abdication

Abdication means abandonment of sovereignty. When the legislature does not legislate and entrusts that primary function to the executive or to an outside agency, there is abdication of legislative power. Abdication may be partial or total. The power of delegate is subject to the qualification that the legislature does not abdicate or efface itself by setting up a parallel legislature.⁶²

But delegation of legislative power need not necessarily amount to abdication or complete effacement.

What constitutes abdication and what class of cases are covered by that expression is always a question of fact and it cannot be defined nor a rule of universal application can be laid down.⁶³

(d) Principles

The question whether there is excessive delegation or not, has to be examined in the light of three broad principles:—

60. *Delhi Laws Act, Re*, AIR 1951 SC 332; 1951 SCR 747; *Municipal Corpn. of Delhi v. Birla Cotton Mills*, AIR 1968 SC 1232; (1968) 3 SCR 251; *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137; AIR 1979 SC 321; *Brij Sunder v. First Addl. Distt. Judge*, (1989) 1 SCC 561; AIR 1989 SC 572; *Ramesh Birch v. Union of India*, 1989 Supp (1) SCC 430; AIR 1990 SC 560.

61. Bonnard cited by Schwartz: *French Administrative Law and the Common Law World*, 1954, p. 93.

62. *Gwalior Rayon Silk Mfg. Co. v. Asstt. Commissioner*, (1974) 4 SCC 98; AIR 1974 SC 1660; *Mahe Breach Trading Co. v. Union Territory of Pondicherry*, (1996) 3 SCC 741 (746).

63. *Id.*; See also, *Delhi Laws Act, Re (supra)*; *Municipal Corpn. of Delhi v. Birla Cotton Mills (supra)*; *Sitaram v. State of U.P.*, (1972) 4 SCC 485; AIR 1972 SC 1168.

- (1) Essential legislative functions to enact laws and to determine legislative policy cannot be delegated.
- (2) In the context of modern conditions and complexity of situations, it is not possible for the legislature to envisage in detail every possibility and make provisions for them. The legislature, therefore, has to delegate certain functions provided it lays down legislative policy.
- (3) If the power is conferred on the executive in a manner which is lawful and permissible, the delegation cannot be held to be excessive merely on the ground that the legislature could have made more detailed provisions.⁶⁴

(e) Test

In dealing with the challenge to the *vires* of any statute on the ground of excessive delegation it is necessary to enquire whether the impugned delegation involved surrender of essential legislative function and whether the legislature has left enunciation of policy and principle to the delegate. If the reply is in the affirmative, there is excessive delegation but if it is in the negative, the challenge must necessarily fail.

A statute challenged on the ground of excessive delegation must be subjected to two tests:

- (i) Whether it delegates essential legislative function; and
- (ii) Whether the legislature has enunciated its policy and principle for the guidance of the executive.⁶⁵

(f) Powers and duties of Courts

The Founding Fathers of the Constitution have entrusted the power of legislation to the representatives of the people so that the power may be exercised not only in the name of the people but also by the people speaking through their representatives. The rule against excessive delegation thus flows from and is a necessary postulate of the sovereignty of the people.⁶⁶

At the same time, however, it also cannot be overlooked that in view of multifarious activities of a modern welfare State, the legislature can

64. *Jyoti Pershad v. Administrator, Union Territory of Delhi*, AIR 1961 SC 1605: (1962) 2 SCR 125; *Sitaram v. State of U.P.* (*supra*); *Registrar, Co-op. Societies v. Kunjambu*, (1980) 1 SCC 340: AIR 1980 SC 350.

65. *Vasantlal v. State of Bombay*, AIR 1961 SC 4: (1961) 1 SCR 341; *Harishankar v. State of M.P.*, AIR 1954 SC 465: (1955) 1 SCR 380; *Mahe Breach Trading Co. v. Union Territory of Pondicherry* (*supra*).

66. *Gwalior Rayon Silk Mfg. Co. v. Asstt. Commissioner*, (1974) 4 SCC 98 (108-09): AIR 1974 SC 1660; *Vasantlal v. State of Bombay* (*supra*).

hardly find time and expertise to enter into matters of detail. Subordinate legislation within a prescribed sphere is a practical necessity and pragmatic need of the day. Delegation of law-making power is the dynamo of modern Government. If legislative policy is enunciated by the legislature and a standard has been laid down, the Court will not interfere with the discretion to delegate non-essential functions to the executive.⁶⁷

(g) Conclusions

Entrustment of legislative power without laying down policy is inconsistent with the basic concept on which our constitutional scheme is founded. Our Constitution-makers have entrusted the power to legislate to the elected representatives of the people, so that the power is exercised not only in the name of the people, but by the people. *The rule against excessive delegation of legislative authority is a necessary postulate of the sovereignty of the people.* It is not claimed to be nor intended to be a panacea against the shortcomings of public administration. Governance of the State in manner determined by the people through their representatives being the essence of our form of government, the plea that a substitute scheme for governance through delegates may be more effective is destructive of our political structure. (emphasis supplied).⁶⁸

It is submitted that the following observations of Subba Rao, J. (as he then was) in the leading case of *Vasantlal v. State of Bombay*⁶⁹ lay down correct law on the point and, therefore, are worth quoting:

“The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously, it cannot abdicate its function in favour of another. But in view of multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid

67. *Gwalior Rayon Silk Mfg. Co. v. Asstt. Commissioner, id.*, at pp. 108, 121 (SCC).

68. *Municipal Corpn., Delhi v. Birla Cotton Mills*, AIR 1968 SC 1232 (1264): (1968) 3 SCR 251 (Per Shah, J.).

69. AIR 1961 SC 4; (1961) 1 SCR 341.

down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in a whole or in part is beyond the permissible limit of a delegation. *It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limit. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power on executive authorities. It is the duty of this Court to strike down without any hesitation any blanket power conferred on the executive by the legislature.*"⁷⁰ (emphasis supplied)

9. FUNCTIONS WHICH CAN BE DELEGATED (PERMISSIBLE DELEGATION)

Commencement

Several statutes contain an 'appointed day' clause, which empowers the Government to appoint a day for the Act to come into force. In such cases, the operation of the Act depends on the decision of the Government e.g. Section 3 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 provides that the Act 'shall come into operation on such date as the State Government may by notification in the Official Gazette appoint in this behalf'. Here the Act comes into force when the notification is published in the Official Gazette. Such a provision is valid for, as Sir Cecil Carr⁷¹ remarks, "*the legislature provides the gun, and prescribes the target, but leaves to the executive the task of pressing the trigger*". (emphasis supplied)

Supplying details

If the legislative policy is formulated by the legislature, the function of supplying details may be delegated to the executive for giving effect to the policy. What is delegated here is an ancillary function in aid of the exercise of the legislative function e.g. Section 3 of the All India Services Act, 1951 authorises the Central Government to make rules to regulate conditions of service in the All India Services.

Inclusion

Sometimes, the legislature passes an Act and makes it applicable, in the first instance, to some areas and classes of persons, but empowers the Government to extend the provisions thereof to different territories, persons or commodities, etc., e.g., the Transfer of Property Act, 1882

70. AIR 1961 SC 4 at 11-12; see also *Avinder Singh v. State of Punjab* (supra).

71. *Concerning English Administrative Law*, 1941, p. 43.

was made applicable to the whole of India except certain areas, but the Government was authorised to apply the provisions of the Act to those areas also. In the same manner, the Dourin Act, 1910 was made applicable to horses in the first instance but by Section 2(2), the Government was authorised to extend the provisions of the Act to asses as well. By Section 146 of the Indian Railways Act, 1890, the Government was authorised to apply the provisions to tramways.

Exclusion

There are some statutes which empower the Government to exempt from their operation certain persons, territories, commodities, etc. Section 30 of the Payment of Bonus Act, 1965 empowers the Government to exempt any establishment or a class of establishments from the operation of the Act.

Suspension

Some statutes authorise the Government to suspend or relax the provisions contained therein, e.g. under Section 48(1) of the Tea Act, 1953, the Central Government is empowered under certain circumstances to suspend the operation of all or any of the provisions of the said Act.

Application of existing laws

Some statutes confer the power on the executive to adopt and apply statutes existing in other States without modifications (with incidental changes) to a new area. There is no unconstitutional delegation in such cases, as the legislative policy is laid down in the statute by the competent legislature.

Modification

Sometimes, provision is made in the statute authorising the executive to modify the existing statute before application. This is really a drastic power as it amounts to an amendment of the Act, which is a legislative act, but sometimes, this flexibility is necessary to deal with local conditions. Thus, under the powers conferred by the Delhi Laws Act, 1912, the Central Government extended the application of the Bombay Agricultural Debtors' Relief Act, 1947 to Delhi. The Bombay Act was limited in application to the agriculturists whose annual income was less than Rs 500 but that limitation was removed by the Government.

Prescribing punishments

In some cases the legislature delegates to the executive the power to take punitive action, e.g. under Section 37 of the Electricity Act, 1910, the Electricity Board is empowered to prescribe punishment for breach of the provisions of the Act subject to the maximum punishment laid

down in the Act. By Section 59(7) of the Damodar Valley Act, 1948, the power to prescribe punishment is delegated to a statutory authority without any maximum limit fixed by the parent Act.

According to the Indian Law Institute⁷², this practice is not objectionable, provided two safeguards are adopted:

- (i) the legislature must determine the maximum punishment which the rule-making authority may prescribe for breach of regulations; and
- (ii) if such power is delegated to any authority other than the State or Central Government, the exercise of the power must be subject to the previous sanction or subsequent approval of the State or Central Government.

Framing of rules

A delegation of power to frame rules, bye-laws, regulations, etc. is not unconstitutional, provided that the rules, bye-laws and regulations are required to be laid before the legislature before they come into force and provided further that the legislature has power to amend, modify or repeal them.

Removal of difficulties (Henry VIII clause)

Power is sometimes conferred on the Government to modify the provisions of the existing statutes for the purpose of removing difficulties. When the legislature passes an Act, it cannot foresee all the difficulties which may arise in implementing it. The executive is, therefore, empowered to make necessary changes to remove such difficulties. Such provision is also necessary when the legislature extends a law to a new area or to an area where the socio-economic conditions are different.

Generally, two types of "removal of difficulties" clauses are found in statutes. A narrow one, which empowers the executive to exercise the power of removal of difficulties consistent with the provisions of the parent Act; e.g. Section 128 of the States Reorganisation Act, 1956 reads as under:

"If any difficulty arises in giving effect to the provisions of this Act, the President may by order do anything not inconsistent with such provisions which appears to him to be necessary or expedient for the purpose of removing the difficulty."

Such a provision is not objectionable. According to the Committee on Ministers' Powers,⁷³ the sole purpose of Parliament in enacting such

72. *Delegated Legislation in India*, (ILI) 1964, p. 25.

73. *Committee on Ministers' Powers Report*, 1932, p. 36.

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a provision is 'to enable minor adjustments of its own handiworks to be made for the purpose of fitting its principles into the fabric of existing legislation, general or local'. Sir Cecil Carr⁷⁴ rightly says, "the device is partly a draftsman's insurance policy in case he has overlooked something, and partly due to the immense body of local Acts in England creating special difficulties in particular areas". By exercising this power the Government cannot modify the parent Act nor can it make any modification which is not consistent with the parent Act.

Another type of "removal of difficulties" clause is very wide and authorises the executive in the name of removal of difficulties to modify even the parent Act or any other Act. The classic illustration of such a provision is found in the Constitution itself.⁷⁵ Usually, such a provision is for a limited period.

This provision has been vehemently criticised by Lord Hewart⁷⁶ and other jurists. It is nicknamed as the *Henry VIII clause* to indicate executive autocracy. Henry VIII was the King of England in the 16th century and during his regime he enforced his will and got his difficulties removed by using instrumentality of a servile Parliament for the purpose of removing the difficulties that came in his way. According to the Committee on Ministers' Powers,⁷⁷ the King is regarded popularly as the impersonation of executive autocracy and such a clause 'cannot but be regarded as inconsistent with the principle of parliamentary Government'.⁷⁸

74. *Concerning English Administrative Law*, 1941, p. 44.

75. Article 372(2) reads as under:

"For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law." See also S. 35 of the Sick Industrial Companies (Special Provisions) Act, 1985.

76. *The New Despotism*, 1929, p. 60.

77. *Committee on Ministers' Powers Report*, 1932, p. 61.

78. Henry VIII (1491-1547), King of England from 1509 to 1547. He has been described as a "despot under the forms of law"; and it is apparently true that he committed no illegal act. His disposition consists not in any attempt to rule unconstitutionally but in the extraordinary degree to which he was able to use constitutional means in the furtherance of his own personal ends. His activity, his remarkable political insight, his lack of scruples and his combined strength of will and subtlety of intellect enabled him to utilize all the forces which tended at that time towards a strong Government throughout Western Europe. *Encyclopaedia Britannica* (1768), Vol. 11, pp. 367-69.

In *Jalan Trading Co. v. Mill Mazdoor Sabha*⁷⁹, the Supreme Court was called upon to decide the legality of such a clause. Section 37(1) of the Payment of Bonus Act, 1965 empowered the Central Government to make such orders, not inconsistent with the purposes of the Act, as might be necessary or expedient for the removal of any doubts or difficulties. Section 37(2) made the order passed by the Central Government under sub-section (1) final. The Court by a majority⁸⁰ of 3: 2 held Section 37 *ultra vires* on the ground of excessive delegation inasmuch as the Government was made the sole judge of whether any difficulty or doubt had arisen, whether it was necessary or expedient to remove such doubt or difficulty and whether the order made was consistent with the provisions of the Act. Again, the order passed by the Central Government was made 'final'. Thus, in substance, legislative power was delegated to the executive authority, which was not permissible.

The minority, however, took a liberal view and held that the functions to be exercised by the Central Government were not legislative functions at all but were intended to advance the purpose which the legislature had in mind. In the words of Hidayatullah, J. (as he then was): "Parliament has not attempted to set up another legislature. It has stated all that it wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to Courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and differences by a suitable order."

It is submitted that the minority view is correct and after *Jalan Trading Co.*, the Supreme Court adopted a liberal approach. In *Gammon India Ltd. v. Union of India*⁸¹ a similar provision was held constitutional by the Court. Distinguishing *Jalan Trading Co.*, the Court observed: "In the present case, neither finality nor alteration is contemplated in any order under Section 34 of the Act. Section 34 is for giving effect to the provisions of the Act. This provision is an application of the internal functioning of the administrative machinery."⁸² It, therefore, becomes clear that after *Jalan Trading Co.*, the Court changed its view and virtually overruled the majority judgment.

79. AIR 1967 SC 691: (1967) 1 SCR 15.

80. Wanchoo, Shah and Sikri, JJ. (Hidayatullah and Ramaswamy, JJ. *contra*).

81. (1974) 1 SCC 598: AIR 1974 SC 960.

82. *Id.* at p. 607 (SCC).

In *Patna University v. Amita Tiwari*,⁸³ the relevant statute enabled the Chancellor to issue directions to universities "in the administrative or academic interests." In exercise of that power, the Chancellor directed the University to regularise services of an ineligible teacher "on compassionate grounds." When the action was challenged, it was sought to be supported on the basis of "removal of difficulties" clause. Holding that the "removal of difficulties" clause had only limited application, the Supreme Court quashed the order.

It is submitted that by using a 'removal of difficulties' clause, the Government "may slightly tinker with the Act to round off angularities and smoothen the joints or remove minor obscurities to make it workable, but it cannot change features of the Act. *In no case can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.*"⁸⁴ (emphasis supplied) The Committee on Ministers' Powers rightly opined that it would be dangerous in practice to permit the executive to change an Act of Parliament and made the following recommendation:

"The use of the so-called Henry VIII clause conferring power on a Minister to modify the provisions of Acts of Parliament should be abandoned in all but most exceptional cases and should not be permitted by Parliament except upon special grounds stated in a ministerial memorandum to the Bill. *Henry VIII clause should never be used except for the sole purpose of bringing the Act into operation but subject to the limit of one year.*"⁸⁵ (emphasis supplied)

10. FUNCTIONS WHICH CANNOT BE DELEGATED (IMPERMISSIBLE DELEGATION)

Essential legislative functions

Even though there is no specific bar in the Constitution of India against the delegation of legislative power by the legislature to the executive, it is now well-settled that *essential legislative functions* cannot be delegated by the legislature to the executive. In other words, *legislative policy* must be laid down by the legislature itself and by entrusting this power to the executive, the legislature cannot create a parallel legislature.

83. (1997) 7 SCC 198.

84. Per Sarkaria, J. in *Sinai v. Union of India*, (1975) 3 SCC 765: AIR 1975 SC 797 (809).

85. Cited by Mahajan J. in *Delhi Laws Act, 1912, Re*, AIR 1951 SC 332 (372). For detailed discussion: see C.K. Thakker: *Administrative Law*, 1992, pp. 86-91.

Repeal of law

Power to repeal a law is essentially a legislative function, and therefore, delegation of power to the executive to repeal a law is excessive delegation and is *ultra vires*.

Modification

Power to modify the Act in its important aspects is an essential legislative function and, therefore, delegation of power to modify an Act without any limitation is not permissible. However, if the changes are not essential in character, the delegation is permissible.

Exemption

The aforesaid principle applies in case of exemption also, and the legislature cannot delegate the power of exemption to the executive without laying down the norms and policy for the guidance of the latter.

Removal of difficulties

Under the guise of enabling the executive to remove difficulties, the legislature cannot enact a *Henry VIII clause* and thereby delegate essential legislative functions to the executive, which could not otherwise have been delegated.

Retrospective operation

The legislature has plenary power of law making and in India, Parliament can pass any law prospectively or retrospectively subject to the provisions of the Constitution. But this principle cannot be applied in the case of delegated legislation. Giving an Act retrospective effect is essentially a legislative function and it cannot be delegated.⁸⁶

Future Acts

The legislature can empower the executive to adopt and apply the laws existing in other States, but it cannot delegate the power by which the executive can adopt the laws which may be passed in future, as this is essentially a legislative function.

Imposition of tax⁸⁷**Ouster of jurisdiction of courts**

The legislature cannot empower the executive by which the jurisdiction of courts may be ousted. This is a pure legislative function.

⁸⁶. For detailed discussion see Lect. V (*infra*).

⁸⁷. See Taxing Statutes (*infra*).

Offences and penalty

The making of a particular act into an offence and prescribing punishment for it is an essential legislative function and cannot be delegated by the legislature to the executive. However, if the legislature lays down the standards or principles to be followed by the executive in defining an offence and provides the limits of penalties, such delegation is permissible.

11. DELEGATION IN FAVOUR OF LOCAL AUTHORITIES

(a) General

Local authorities are subordinate branches of governmental activities. They are democratic institutions managed by representatives of the people. They function for public purposes and take away a part of the government affairs in local areas. They are political sub-divisions and agencies which exercise a part of State functions.⁸⁸

(b) Nature and scope

Where a legislature confers power of delegated legislation on local authorities such as municipalities, panchayats, local boards, etc. the question must be decided bearing in mind various considerations.

There is a wide area of delegation in the matter of imposition of taxes. Such taxes are for local needs for which local inquiries have to be made. They are usually left to the representatives of the local population, including those who pay taxes. Moreover, such taxes vary from place to place and from commodity to commodity. The problems of different local bodies may also be different. One local authority may require one kind of tax at a particular rate at a particular time while another local authority may need another kind of tax at another rate at some other time. It is impossible for the legislature to enact laws for the imposition of uniform taxes in all local areas. Regard being had to the democratic set up of local bodies which need the proceeds of such taxes for their own administration, it is appropriate to leave to the local authorities the power to impose and collect taxes. It is not necessary to specify all the situations in which taxes can be imposed. It is also not necessary to fix the rates at which taxes can be imposed and even fixation of rate can be left to such local authorities, provided the legislature has taken care to specify sufficient safeguards necessary in fixing the rate.⁸⁹

88. *Municipal Corpn. of Delhi v. Birla Cotton Mills*, AIR 1968 SC 1232 (1254): (1968) 3 SCR 251.

89. *Ibid.*, at pp. 1261-63 (AIR).

(c) Object

Local authorities have to perform various statutory functions. For discharging those functions, they need money. Their needs vary from time to time with the prevailing exigencies. The power to impose and collect tax, however, must necessarily be limited by the expenses required to discharge such functions. A local authority cannot spend anything for any purpose other than those specified in the Act which creates it.⁹⁰

(d) Judicial approach

Judiciary has adopted liberal attitude in the matters of delegation of legislative power in favour of local authorities. In various cases, it has been held that the power to impose tax, to prescribe the maximum or minimum rate of tax, to fix class or classes of persons or the description or descriptions of articles or properties to be taxed and to lay down the system of assessment and exemptions, if any, to be granted can be left to local bodies and conferment of such power does not amount to excessive delegation.⁹¹

In *Municipal Corpn. of Delhi v. Birla Cotton Mills*⁹², Wanchoo, C.J. stated: "(I)t appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."⁹³

(e) Limitations

Even if it is conceded that while deciding the question of constitutionality of a provision permitting delegated legislation the fact that delegation is made in favour of an elected body responsible to the people and is accountable to the local electorate is a relevant consideration, it is not the conclusive factor in holding the delegation valid and permissible. If that be true, Parliament may justifiably and indiscriminately delegate its power to other bodies by constituting them from among the representatives of the people.⁹⁴

90. *Municipal Corpn. of Delhi v. Birla Cotton Mills*, supra; *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137; AIR 1979 SC 321.

91. *Ibid.*, see also *Gulabchand Bapalal v. Ahmedabad Municipal Corpn.*, (1972) 4 SCC: AIR 1971 SC 2100.

92. AIR 1968 SC 1232; (1968) 3 SCR 251.

93. AIR 1968 SC 1232 (1244); (1968) 3 SCR 251 (269-70). See also *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137 (151); AIR 1979 SC 321.

94. AIR 1968 SC 1232 (1243, 1264); (1968) 3 SCR 251.

(f) Principles

In the leading case of *Municipal Corpn. of Delhi v. Birla Cotton Mills*,⁹⁵ after considering Foreign and Indian decisions on the point, the following principles have been laid down by Wanchoo, C.J.:

- (1) that the delegation was to an elected body responsible to the people, including those who pay taxes and to whom the councillors have every four years to turn to for being elected;
- (2) that the limits of taxation were to be found in the purposes of the Act for the implementation of which alone taxes could be raised and though this factor was not conclusive, it was nonetheless relevant and must be taken into account with other relevant factors;
- (3) that the impugned Section 150 itself contained a provision which required that the maximum rate fixed by the Corporation should have the approval of the Government;
- (4) that the Act contained provisions which required adoption of budget estimates by the Corporation annually; and
- (5) that there was a check by the courts of law where the power of taxation is used unreasonably or in non-compliance or breach of the provisions and objects of the Act.⁹⁶

(g) Conclusions

The doctrine of excessive delegation of legislative power applies to the conferment of such power on local authorities as well. The constitutional power to legislate in respect of a particular subject such as local Government⁹⁷ does not carry with it the power to delegate essential legislative functions. Authority to legislate in respect of powers of local bodies may include authority to confer power upon local bodies to impose and collect tax but such power cannot override constitutional limitations against abdication of essential legislative functions. The expression "power" does not include authority to delegate the essential legislative function without disclosing principles, policy or standard guiding the local bodies in the exercise of the power.

It is submitted that the following observations of Shah, J. (as he then was) in *Municipal Corpn. of Delhi v. Birla Cotton Mills*⁹⁸ lay down

95. AIR 1968 SC 1232: (1968) 3 SCR 251.

96. AIR 1968 SC 1232 (1245-47): (1968) 3 SCR 251; see *Gulabchand Bapalal v. Municipal Corpn. of Ahmedabad City*, AIR 1971 SC 2100 (2106).

97. Constitution of India, Schedule VII, List II, Entry 5.

98. AIR 1968 SC 1232: (1968) 3 SCR 251.

correct law on the point. His Lordship rightly stated:

“A local authority is undoubtedly an instrument of the State in the matter of local Government restricted to a particular area in which it functions. By investing a local authority with powers of legislation for administration of the Act relating to local Government, sovereign power of the State is entrusted to the body for limited purpose; but the entrustment of power is as a delegate, and must in our view be within the limits of permissible entrustment consistent with the constitutional scheme. *The power of the State to legislate in matters of taxation within the allotted field is plenary, but in entrusting that power to a local authority the legislature cannot confer unguided authority.*¹ (emphasis supplied)

12. TAXING STATUTES

With regard to delegation in taxing legislation, the following principles may be treated as well settled²:

- (1) The power to impose a tax is essentially a legislative function. Under Article 265 of the Constitution no tax can be levied or collected *save by authority of law*, and here ‘law’ means law enacted by the competent legislature and not made by the executive. Therefore, the legislature cannot delegate the essential legislative function of imposition of tax to an executive authority.
- (2) Subject to the above limitation, a power can be conferred on the Government to exempt a particular commodity from the levy of tax or to bring certain commodities under the levy of tax.
- (3) The legislature is competent to enact two laws providing for two taxes of the same kind on the same commodity for different purposes.
- (4) If a particular item is declared non-taxable under one enactment but is declared taxable under the other, there cannot be said to be conflict between the two enactments and one cannot repeal the other.
- (5) The power to fix the rate of tax is a legislative function, but if the legislative policy has been laid down, the said power can be delegated to the executive. Commodities belonging to the same category should not, however, be subjected to different and discriminatory rates in absence of any rational basis.

1. AIR 1968 SC 1232 at 1261.

2. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 93-95.

- (6) The circumstance that the affairs of the taxing body (Panchayat, Municipality, Corporation, etc.) are administered by the elected representatives responsible to the people is wholly irrelevant and immaterial in determining whether the delegation is excessive or otherwise.
- (7) A taxing statute should be construed strictly. If a provision is ambiguous, the interpretations which favours the assessee should be accepted.
- (8) A distinction, however, should always be made between charging provisions and machinery provisions. Machinery provisions should be construed liberally so as to make charging provisions effective and workable.

13. CONDITIONAL LEGISLATION

(a) Definition

Hart³ defines conditional legislation as 'a statute that provides controls but specifies that they are to go into effect only when a given administrative authority fulfils the existence or conditions defined in the statute'.

(b) Nature and scope

In conditional legislation, legislature makes the law. It is full and complete. No legislative function is delegated to the executive. But the said Act is not brought into force and it is left to the executive to bring the Act into operation on fulfilment of certain conditions or contingencies and for that reason the legislation is called 'conditional legislation' or 'contingent legislation'.

Cooley⁴ also says: "It is not always essential that a legislative act should be a completed statute which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event."

(c) Illustrative cases

In the leading case of *Field v. Clark*⁵, the President was empowered to suspend the operation of an Act permitting free import of certain products in the U.S. on being satisfied that the duties imposed upon such products were reciprocally unequal and unreasonable. The Supreme

3. *An Introduction to Administrative Law with Selected Cases*, 2nd Edn., p. 810.

4. *A Treatise on the Constitutional Limitations*, 8th Edn., Vol. I, p. 227.

5. (1892) 143 US 649.

Court held the Act valid on the ground that the Act was complete and the President was a mere agent of Congress to ascertain and declare the contingency upon which the will of Congress was to take effect. The Court quoted with approval the following famous passage from a *Pennsylvania case*⁶:

“The Legislature cannot delegate its powers to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things on which wise and useful legislation must depend which cannot be known to the law-making power and must, therefore, be the subject of enquiry and determination outside the hall of the Legislature.”

In *Emperor v. Benoari Lal*⁷, by promulgating an Ordinance, the Governor-General was empowered to set up special courts. But the operation of the Ordinance was left to the Provincial Government on being satisfied that emergency had come into existence. The High Court of Calcutta⁸ held that there was excessive delegation and the Ordinance was, therefore, invalid. The Federal Court⁹ confirmed the decision of the Calcutta High Court, but the Privy Council reversed the decision and upheld the validity of the Act. According to the Privy Council, it was a piece of conditional legislation as the legislation was complete and what had been delegated was the power to apply the Act on fulfilment of certain conditions.

In *State of Bombay v. Narottamdas*¹⁰, by the Bombay City Civil Court Act, 1948, an Additional Civil Court was established for Greater Bombay having jurisdiction to try all suits not exceeding Rs 10,000 but the State Government was authorised to raise the jurisdiction up to Rs 25,000. The Supreme Court held that the provision was merely a conditional legislation and upheld it. The legislature itself determined that the new court should be invested with the jurisdiction up to Rs 25,000 in value, but left it to the executive to determine when the said power could be exercised.

Again, in *Inder Singh v. State of Rajasthan*¹¹, the Rajasthan Tenants' Protection Ordinance was promulgated for two years, and under Section

6. (1873) 71 *Locke's Appeal* 491.

7. AIR 1945 PC 48; 72 IA 57.

8. *Benoari Lal v. Emperor*, AIR 1943 Cal 285; 44 Cri LJ 673 (FB).

9. *Emperor v. Benoari Lal*, AIR 1943 FC 36; 208 IC 564.

10. AIR 1951 SC 69; 1951 SCR 51.

11. AIR 1957 SC 510; 1957 SCR 605.

thereof, the Rajpramukh was empowered to extend the life of the said Ordinance by issuing a notification, if required. The duration of the Ordinance was extended by issuing a notification which was challenged before the Supreme Court. The Court upheld the provision as being conditional legislation.

If we compare this case with *Jatindra Nath Gupta*¹², one thing seems to be clear, that before Independence, the Federal Court had taken a narrow view with regard to delegated legislation while the Supreme Court has taken a liberal view.

In *Tulsipur Sugar Co. Ltd. v. Notified Area Committee*¹³, by issuing a notification under Section 3 of the U.P. Town Areas Act, 1914, the limits of Tulsipur Town were extended to village Shitalpur where the sugar factory of the plaintiff was situated. The notification was challenged on the ground that the procedure under the Act was not followed and the subordinate legislation was, therefore, bad. Negativising the contention and holding the case to be one of conditional legislation, the Supreme Court held that 'the effect of making the Act applicable to a geographical area is in the nature of conditional legislation' and that 'it cannot be characterised as a piece of subordinate legislation'.¹⁴

d) Conditional Legislation and Delegated Legislation: Distinction

Delegated legislation is sometimes distinguished from conditional legislation on the anvil of *discretion*. In conditional legislation, it is the duty of the executive to apply the law after performing the function of *fact-finding* (e.g. to inquire whether facts requiring operation of the Act exist); on the other hand, in case of delegated legislation, it is left to the *discretion* of the Government whether to exercise the power delegated to it or not. In *Hamdard Dawakhana v. Union of India*¹⁵, the Supreme Court pointed out the distinction between the two in the following terms:

"The distinction between conditional legislation and delegated legislation is that in the former the delegate's power is that of determining when a legislative-declared rule of conduct shall become effective... and the latter involves delegation of rule-making power which constitutionally may be exercised by the administrative agent."

However the question is: Can it be said that there is total absence of discretion in conditional legislation? As a matter of fact, whether

2. *Jatindra Nath Gupta v. Province of Bihar*, AIR 1949 FC 175; 1949 FCR 595.

3. (1980) 2 SCC 295; AIR 1980 SC 882.

4. *Id.* at p. 306 (SCC).

5. AIR 1960 SC 554 (566); (1960) 2 SCR 671.

emergency exists or not, or whether tariff rates are high or low or whether the application of law is reasonable or unreasonable cannot be decided on *mere facts* and the element of *discretion* definitely creeps in.

(e) Conclusions

It is submitted that in view of the rapid growth of Administrative Law and acceptance of the doctrine of delegated legislation, now it is not necessary to stick to the artificial distinction between 'delegated legislation' and 'conditional legislation'. When the courts were not readily accepting or approving the doctrine of delegated legislation, in the guise of conditional legislation, they were upholding the legislative measures. '*Contingent formula*' was merely a fiction employed by the Supreme Court of the U.S. to get away from the doctrine of separation of powers. This doctrine had some validity in pre-Constitution India because the courts were not willing to concede to the non-sovereign legislatures the power of delegated legislation, and therefore, the term '*conditional legislation*' was applied in order to uphold a limited delegation of legislative power. What can be upheld by conditional legislation can be easily upheld as delegated legislation. The capacity of the legislature to delegate having been recognised now, the doctrine of conditional legislation appears to have become redundant because the greater would include the lesser. *Subordinate legislation* is a broader term which would include a narrower term '*conditional legislation*' inasmuch as, conditional legislation is 'a form of delegation' and 'a very common instance of delegated legislation'.

14. SUB-DELEGATION

(a) Definition

When a statute confers some legislative powers on an executive authority and the latter further delegates those powers to another subordinate authority or agency, it is called 'sub-delegation'.

Thus, in sub-delegation, a delegate further delegates. This process of sub-delegation may go through many stages. If we may call the enabling Act the 'parent' and the delegated and sub-delegated legislation the 'children', the parent, in his own lifetime may beget descendants up to four or five degrees.

(b) Illustration

An important illustration of sub-delegation is found in the Essential Commodities Act, 1955. Section 3 of the Act empowers the Central Government to make rules. This can be said to be the first-stage delegation. Under Section 5, the Central Government is empowered to delega

powers to its officers, the State Governments and their officers. Usually under this provision, the powers are delegated to State Governments. This can be said to be the second-stage delegation (sub-delegation). When the power is further delegated by the State Governments to their officers, it can be said to be the third-stage delegation (sub-sub-delegation). Thus, under Section 3 of the Essential Commodities Act, 1955, the Sugar Control Order, 1955 was made by the Central Government (first-stage delegation). Under the Order, the functions and powers are conferred on the Textile Commissioner (second-stage delegation). Clause 10 empowered the Textile Commissioner to authorise any officer to exercise on his behalf all or any of his functions and powers under the Order (third-stage delegation).

(c) Object

The necessity of sub-delegation is sought to be supported, *inter alia*, on the following grounds:

- (i) power of delegation necessarily carries with it power of further delegation; and
- (ii) sub-delegation is *ancillary* to delegated legislation; and any objection to the said process is likely to subvert the authority which the legislature delegates to the executive.

Sub-delegation of legislative power can be permitted either when such power is expressly conferred by the statute or can be inferred by necessary implication.

(d) Express power

Where a statute itself authorises an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such sub-delegation is within the terms of the statute itself. Thus in *Central Talkies v. Dwarka Prasad*¹⁶, the U.P. (Temporary) Control of Rent and Eviction Act, 1947 provided that no suit shall be filed for the eviction of a tenant without permission either of a District Magistrate or any officer authorised by him to perform any of his functions under the Act. An order granting permission by the Additional District Magistrate to whom the powers were delegated was held valid.

On the other hand, in *Allingham v. Minister of Agriculture*¹⁷, under the relevant statute, the Committee was empowered by the Minister of Agriculture to issue directions. The Committee sub-delegated its power to its subordinate officer, who issued a direction, which was challenged.

16. AIR 1961 SC 606: (1961) 3 SCR 495.

17. (1948) 1 All ER 780.

The court held that sub-delegation of power by the committee was not permissible and the direction issued by the subordinate officer was, therefore, *ultra vires*.

In *Ganpati v. State of Ajmer*¹⁸, the parent Act empowered the Chief Commissioner to make rules for the establishment of proper system of conservancy and sanitation at fairs. The rules made by the Chief Commissioner, however, empowered the District Magistrate to devise his own system and see that it was observed. The Supreme Court declared the rules *ultra vires* as the parent Act conferred the power on the Chief Commissioner and not on the District Magistrate and, therefore, the action of the Chief Commissioner sub-delegating that power to the District Magistrate was invalid.

Again, sometimes, a statute permits sub-delegation to authorities or officers not below a particular rank or in a particular manner only. As per settled law "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited". In other words, '*where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all*'.¹⁹ (emphasis supplied)

In *Ajaib Singh v. Gurbachan Singh*²⁰, under the relevant statute, the Central Government was empowered to make rules for detention of any person by an authority not below the rank of District Magistrate. Where the order of detention was passed by an Additional District Magistrate, the action was held bad. Again, if sub-delegation is to be made through regulations, it could not be effected by passing a resolution. In *Barium Chemicals Ltd. v. Company Law Board*²¹, the rules framed by the Central Government empowered the Chairman to distribute the business of the Board among himself as well as other members. The Chairman passed an order vesting certain powers in himself alone. The Supreme Court by a majority of 3 : 2²² upheld the said Act. In a dissenting judgment, Shelat, J., however, rightly observed: "The statute having permitted the delega-

18. AIR 1955 SC 188; (1955) 1 SCR 1065; see also *A.K. Roy v. State of Punjab*, (1986) 4 SCC 326; AIR 1986 SC 2160.

19. *Craies on Statute Law*, 6th Edn., p. 263; see also *Barium Chemicals v. Company Law Board* (*infra*).

20. AIR 1965 SC 1619; (1965) 2 SCR 845; see also *Hari Chand v. Batala Engg. Co.*, AIR 1969 SC 483; (1969) 2 SCR 201.

21. AIR 1967 SC 295; 1966 Supp SCR 311.

22. Sarkar, C.J., Mudholkar and Bachawat, JJ. (*Hidayatullah and Shelat, JJ. contra.*); see p. 329 (AIR).

tion of powers to the Board only as the statutory authority, the powers so delegated have to be exercised by the Board and *not by its components*.''²³ (emphasis supplied)

(e) Implied power

But what would be the position if there is no specific or express provision in the statute? The answer is not free from doubt. In *Jackson v. Butterworth*²⁴, Scott, L.J. held that the method (of sub-delegating power to issue circulars to local authorities) was convenient and desirable, but the power so to sub-delegate was, unfortunately, absent.

The other view is that even if there is no provision in the parent Act about sub-delegation of power by the delegate, the same may be inferred by necessary implication. Griffith rightly states, "if the statute is so widely phrased that two or more 'tiers' of sub-delegation are necessary to reduce it to specialised rules on which action can be based, then it may be that the courts will imply the power to make the necessary sub-delegated legislation".

In *States v. Bareno*²⁵, the parent Act conferred on the President the power to make regulations concerning exports and provided that unless otherwise directed the functions of the President should be performed by the Board of Economic Welfare. The Board sub-delegated the power to its Executive Director, who further sub-delegated it to his assistant, who in turn delegated it to some officials. The court held all the sub-delegations valid.

(f) Criticism

The practice of sub-delegation has been heavily criticised by jurists. It is well established that the maxim *delegatus non potest delegare* (a delegate cannot further delegate) applies in the field of delegated legislation also and sub-delegation of power is not permissible unless the said power is conferred either expressly or by necessary implication. de Smith²⁶ says, 'there is strong presumption against construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to

23. AIR 1967 SC 295 (329): 1966 Supp SCR 311; see also *Naraindas v. State of M.P.*, (1974) 4 SCC 788: AIR 1974 SC 1232.

24. (1948) 2 All ER 558.

25. 50 F Supp 520; see also *Harishankar Bagla v. State of M.P.*, AIR 1954 SC 465: (1955) 1 SCR 380.

26. *Judicial Review of Administrative Action*, 1995, pp. 357-58; see also *Halsbury's Laws of England*, (4th Edn.), Vol. 1, p. 354 cited in *Sahni Silk Mills (P) Ltd. v. ESI Corpn.*, (1994) 5 SCC 346.

it'. Bachawat, J. in the leading case of *Barium Chemicals Ltd. v. Company Law Board*²⁷ states: "The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot redelegate his authority."

It is also said, 'sub-delegation at several stages removed from the source dilutes accountability of the administrative authority and weakens the safeguards granted by the Act. It becomes difficult for the people to know whether the officer is acting within his prescribed sphere of authority. It also transfers power from a higher to a hierarchically lower authority. It is, therefore, necessary to limit in some way the degrees to which sub-delegation may proceed.'²⁸

Finally, there are serious difficulties about publication of sub-delegated legislation. Such legislation, not being an Act of Legislature, there is no general statutory requirement of publicity. 'Though casually made by a minor official, sub-delegation creates a rule and sets up a standard of a conduct for all to whom the rule applies. No individual can ignore the rule with impunity.'²⁹ But at the same time the general public must have access to the law and they should be given an opportunity to know the law. In case of such delegated and sub-delegated legislation, proper publication is lacking.

(g) Conclusions

It is submitted that the following observations of Streatfield, J. in *Patchett v. Leathem*³⁰ are worth remembering:

"Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; thirdly, it is a jumble of provisions, legislative, administrative, or directive in character; and, fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction."³¹

27. AIR 1967 SC 295 (311-12); 1966 Supp SCR 311.

28. M.P. Jain: *Treatise on Administrative Law*, 1996, Vol. 1, p. 180.

29. Rao: *Administrative Law*, 1981, p. 72.

30. (1949) 65 TLR 69.

31. *Id.* at p. 70; see also Wade: *Administrative Law*, 1988, p. 861; *Srinivasan v.*

15. GENERAL PRINCIPLES

From various judgments of the Supreme Court the following general principles regarding delegated legislation emerge:³²

- (1) The Constitution confers a power and imposes a duty on the legislature to make laws and the said function cannot be delegated by the legislature to the executive or even to another legislature. It can neither create a parallel legislature nor destroy its legislative power.
- (2) The legislature must retain in its own hands the essential legislative functions. The essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct.
- (3) Once the essential legislative function is performed by the legislature and the policy has been laid down, it is open to the legislature to delegate to the executive authority ancillary and subordinate powers necessary for carrying out the policy and purposes of the Act as may be necessary to make the legislation effective, useful and complete.
- (4) The legislative policy may be reflected in as few or in as many words as the legislature thinks fit. It may be express or implied. It may be gathered from the history, preamble, title, scheme, statement of objects and reasons, etc.
- (5) The authority to which delegation is made is also one of the factors to be considered in determining the validity of such delegation. However, delegation cannot be upheld merely on the basis of status, character or dignity of the delegate.
- (6) Safeguards against the abuse of delegated power including power to repeal do not make delegation valid if otherwise it is excessive, impermissible or unwarranted.
- (7) Delegated legislation must be consistent with the parent Act and cannot travel beyond the legislative policy and standard laid down by the legislature.
- (8) Whether or not the legislature has performed the essential legislative function and laid down the policy and the delegation is permissible depends upon the facts and circumstances of each case.

State of Karnataka, (1987) 1 SCC 658; AIR 1987 SC 1059; see further Lecture V (*infra*).

32. For case-law see C.K. Thakker: *Administrative Law*, 1996, p. 103.

- (9) It is for the court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature has exceeded limits of permissible delegation. It is, however, the duty of the court to strike down without hesitation any arbitrary power conferred on the executive by the legislature.
 - (10) These principles apply to all forms of delegated legislation, such as conditional legislation, subordinate legislation, supplementary legislation, sub-delegation, etc.
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Lecture V

Delegated Legislation (Controls and Safeguards)

We doubt, however, whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused.

—THE COMMITTEE ON MINISTERS' POWERS

Today the question is not whether delegated legislation is desirable or not, but it is what controls and safeguards can be introduced so that the power conferred is not misused or misapplied.

—THE COMMITTEE ON SUBORDINATE LEGISLATION

It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover dormant or latent legislative policy to sustain an arbitrary power conferred on the executive authorities. It is the duty of the Court to strike down without any hesitation any blanket power conferred on the executive by the legislature.

—JUSTICE SUBBA RAO

SYNOPSIS

1. Introduction

2. Judicial control

(A) Substantive ultra vires

(a) Definition

(b) Principle explained

(c) Circumstances

(i) Where parent Act is unconstitutional

(ii) Where delegated legislation is inconsistent with parent Act

(iii) Where delegated legislation is unconstitutional

(iv) Unreasonableness

(a) England

(b) India

(v) Mala fide: Bad faith

(a) England

(b) India

(vi) Sub-delegation

(a) Sub-delegation of legislative power

(b) Sub-delegation of judicial power

- (c) Sub-delegation of administrative power
 - (vii) Exclusion of judicial review
 - (viii) Retrospective operation
 - (d) Ultra vires act: Effect
 - (B) Procedural ultra vires
 - (a) Definition
 - (b) Principle explained
 - (c) Requirements
 - (1) Publication
 - (i) Object
 - (ii) England
 - (iii) U.S.A.
 - (iv) India
 - (v) Directory or mandatory
 - (vi) Mode of publication
 - (vii) Effect of publication
 - (viii) Defect in publication
 - (ix) Conclusions
 - (2) Consultation
 - (i) Meaning
 - (ii) Object
 - (iii) Nature and scope
 - (iv) England
 - (v) U.S.A.
 - (vi) India
 - (vii) Failure to consult: Effect
 - (viii) Concluding remarks
3. Legislative Control
 - (a) General
 - (b) Object
 - (c) Modes
 - (i) Laying on table
 - (A) Object
 - (B) Types
 - (C) Suggestions
 - (D) Effect of laying
 - (E) Failure to lay
 - (F) Conclusions
 - (ii) Scrutiny Committees
 - (A) Object
 - (B) Functions
 - (C) Suggestions
 - (d) Conclusions
4. Other controls
5. Conclusions

1. INTRODUCTION

As discussed in Lecture IV, whatever prejudices might have existed against delegated legislation in the past, today it has come to stay. At present, in almost all the countries, the technique of delegated legislation is resorted to and some legislative powers are delegated by the legislature to the executive. Even in England the crusade against delegated legislation has been given up. It has to be conceded that in the present day legislative powers can validly be delegated to the executive *within the permissible limits*. At the same time, there is inherent danger of abuse of the said power by the executive authorities. The basic problem, therefore, is that of controlling the delegate in exercising his legislative powers. As the Committee on Ministers' Powers states, though the practice of delegated legislation is not bad, 'risks of abuse are incidental to it' and, therefore, safeguards are required 'if the country is to continue the advantages of the practice without suffering from its inherent dangers'. Thus, 'today the question is not whether delegated legislation is desirable or not, but what controls and safeguards can and ought to be introduced so that the rule-making power conferred on the Administration is not misused or misapplied'.¹

It has been rightly said that one has to find out a middle course between two conflicting principles; one permitting very wide powers of delegation for practical reasons while the other that no new legislative bodies should be set up by transferring essential legislative functions to administrative authorities.² Delegated legislation has become inevitable but the question of control has become crucial.³

The control must be introduced at two stages: *firstly*, at the source, i.e. the safeguards must be provided when the legislature confers the legislative power on the executive. This aspect has already been discussed in Lecture IV; *secondly*, some safeguards must be provided in case of misuse or abuse of power by the executive. In this lecture, we will discuss certain controls and safeguards against the possible abuse of legislative power by the executive authorities.

Controls over the delegated legislation may be divided into three categories: (a) judicial control; (b) legislative control; and (c) other controls.

1. Committee on Subordinate Legislation (First Lok Sabha), 1954 (3rd Report), p. 16; see also M.P. Jain: *Treatise on Administrative Law*, 1996, p. 93.

2. *Delhi Laws Act, 1912, Re*, AIR 1951 SC 332 (para 388): 1951 SCR 747.

3. *Committee on Ministers' Powers Report*, 1932, p. 54.

2. JUDICIAL CONTROL

Delegated legislation does not fall beyond the scope of judicial review and in almost all the democratic countries it is accepted that courts can decide the validity or otherwise of delegated legislation mainly applying two tests:—

- (a) substantive *ultra vires*; and
- (b) procedural *ultra vires*.
(*Ultra vires* means beyond powers).

(A) Substantive *ultra vires*

(a) Definition

When a subordinate legislation goes beyond what the delegate is authorised to enact, it is known as substantive *ultra vires*.

(b) Principle explained

Substantive *ultra vires* means that the delegated legislation goes beyond the scope of the authority conferred on it by the parent statute or by the Constitution. It is a fundamental principle of law that a public authority cannot act outside the powers; i.e. *ultra vires*, and it has been rightly described as the 'central principle' and 'foundation of large part of administrative law'. An act which is for any reason in excess of power is *ultra vires*.⁴

Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, *intra vires* the power granted and on relevant considerations. All his decisions, whether characterised as legislative, administrative or *quasi-judicial*, must be in harmony with the Constitution and other laws of the land. They must be reasonably related to the purposes of the enabling legislation. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*."⁵

(c) Circumstances

A delegated legislation may be held to be invalid on the ground of substantive *ultra vires* in the following circumstances:

- (i) Where parent Act is unconstitutional.

4. Wade: *Administrative Law*, 1994, p. 41.

5. *Sitaram Sugar Mills v. Union of India*, (1990) 3 SCC 223(251-52): AIR 1990 SC 1277.

- (ii) Where delegated legislation is inconsistent with the parent Act.
- (iii) Where delegated legislation is unconstitutional.
- (iv) Unreasonableness.
- (v) Mala fide: Bad faith.
- (vi) Sub-delegation.
- (vii) Exclusion of judicial review.
- (viii) Retrospective effect.

Let us consider each ground in detail:

(i) *Where parent Act is unconstitutional*

For delegation to be valid, the first requirement is that the parent Act or enabling statute by which legislative power is conferred on the executive authority must be valid and constitutional, because if the delegating statute itself is *ultra vires* the Constitution and is bad for that reason, delegated legislation also is necessarily bad.

Thus, in *Tan Bug Taim v. Collector of Bombay*⁶, under the Defence of India Act, 1939 the Central Government was empowered to make rules for requisition of immovable property. But the subject of requisition of immovable property was not within the field of the Federal legislature itself. On that ground, the rule was held invalid. Similarly, in *Chintanrao v. State of M.P.*⁷, the parent Act authorised the Deputy Commissioner to prohibit the manufacture of bidis in some areas during certain periods. The order passed by the Deputy Commissioner under the Act was held *ultra vires* inasmuch as the Act under which it was made violated the Fundamental Right to carry on any occupation, trade or business, guaranteed by Article 19(1)(g) of the Constitution of India. Likewise in *New Manek Chowk Mills v. Ahmedabad Municipality*⁸, Rule 7(2) of the rules framed under the Bombay Provincial Municipal Corporations Act, 1949, imposing tax on machinery was held invalid on the ground that the State legislature had power to levy a tax only on lands and buildings and not on machinery.

However, when the parent Act is challenged on the ground that it is unconstitutional or *ultra vires* the powers of the legislature which enacted it, the true nature and character of the statute is required to be ascertained. To do that one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such exam-

6. AIR 1946 Bom 216: 47 Bom LR 1010.

7. AIR 1951 SC 118: 1950 SCR 759.

8. AIR 1967 SC 1801: (1967) 2 SCR 679; see also *Bharat Coking Coal Ltd. v. State of Bihar*, (1990) 4 SCC 557.

ination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. For that purpose, courts have evolved the doctrine of 'pith and substance' or 'true nature and character' of the statute.⁹

Entries in the Seventh Schedule to the Constitution are legislative heads or fields of legislation. The legislature derives its power from Article 246 of the Constitution and not from the respective entries. The language of the respective entries, therefore, should be given widest scope of their meaning. It is well recognised that where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation, the rule of pith and substance has to be applied to determine the competence of the legislature. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it.¹⁰ "It must be remembered that we are interpreting the Constitution and when the court is called upon to interpret the Constitution, it must not be construed in any narrow or pedantic sense and adopt such construction which must be beneficial to the amplitude of legislative powers. *The broad and liberal spirit should inspire those whose duty is to interpret the Constitution to find whether the impugned Act is relatable to any entry in the relevant list.*"¹¹ (emphasis supplied)

(ii) *Where delegated legislation is inconsistent with parent Act*

The validity of the delegated legislation can be challenged on the ground that it is *ultra vires* the parent Act or enabling statute or any general law. It is an accepted principle that delegated authority must be exercised strictly within the authority of law. Delegated legislation can be held valid only if it conforms exactly to the power granted.

Thus, in *U.S. v. Two Hundred Barrels of Whisky*¹², the parent Act provided for admitting duty-free animals especially imported for breeding purposes. The regulation made under the Act required the animals to be of a superior stock if they were to be admitted duty-free. The court held the regulation *ultra vires* as the parent Act included all animals while

9. *United Province v. Atiqa Begum*, AIR 1941 FC 16(25); 1940 FCR 110; *Krishna v. State of Madras*, AIR 1957 SC 297(303); *State of Rajasthan v. Chawla*, AIR 1959 SC 544 (546); 1959 Supp (1) SCR 904; *Jagannath v. State of U.P.*, AIR 1962 SC 1563(1568); (1963) 1 SCR 220.

10. *Goodricke Group Ltd. v. State of West Bengal*, 1995 Supp (1) SCC 707 (718-19)

11. *Jilubhai v. State of Gujarat*, 1995 Supp (1) SCC 596 (609); AIR 1995 SC 142

12. (1877) 95 US 57

the regulation confined its operation to animals of a particular stock alone.

Again, in *Chester v. Bateson*¹³, a regulation issued under the parent Act prohibited a landlord from having access to courts to recover possession of a dwelling, occupied by a war-worker, except with the consent of a Minister and imposed penalty for taking such proceedings. The court held the regulation illegal as it deprived the King's subjects of their right of access to the Courts of Justice and rendered them liable to punishment in case they had the temerity to ask for justice in any of the King's Courts.

This principle is accepted in India also. In *Chandra Bali v. R*¹⁴, the validity of certain rules framed under the Northern India Ferries Act, 1878 was questioned. The Act authorised the making of rules for the purpose of maintaining order and ensuring safety of passengers and property. The delegate, however, framed rules forbidding the establishment of private ferries within a distance of two miles from the boundaries of another ferry. The court held that the rules were outside the scope of the delegated power and therefore *ultra vires*.

Similarly, in *Mohd. Yasin v. Town Area Committee*¹⁵, under the parent Act, the municipality was empowered to charge fee only for the use and occupation of some property of the committee, but the Town Area Committee framed bye-laws and imposed levy on wholesalers irrespective of any use or occupation of property by them. The Supreme Court held that the bye-laws were beyond the powers conferred on the committee and were *ultra vires*.

In *Municipal Corpn. of Greater Bombay v. Nagpal Printing Mills*¹⁶, the parent Act empowered the corporation to levy charge only in respect of water supplied to and consumed by the consumer. The rule, however, authorised levy of charges on the basis of minimum quantity irrespective of consumption. The Supreme Court held the rule *ultra vires* and inconsistent with the parent Act.

Likewise, in *Indian Council of Legal Aid & Advice v. Bar Council of India*¹⁷, a rule was framed by the Bar Council barring enrolment as advocates of persons who had completed 45 years of age. The parent

13. (1920) 1 KB 829.

14. AIR 1952 All 795.

15. AIR 1952 SC 115; see also *State of Karnataka v. Ganesh Kamath*, (1983) 2 SCC 402; AIR 1983 SC 550; *GOC-in-Chief v. Subhash Chandra Yadav*, (1988) 2 SCC 351; AIR 1988 SC 876.

16. (1988) 2 SCC 466; AIR 1988 SC 526.

17. (1995) 1 SCC 732; AIR 1995 SC 691.

Act enabled the Bar Council to lay down conditions subject to which an advocate "shall have right to practice". Declaring the rule *ultra vires*, the Supreme Court held that the Bar Council can make the rule only after a person is enrolled as an advocate, i.e. at post-enrolment stage. It cannot frame a rule barring persons from enrolment. The rule was thus inconsistent with the parent Act.

The question, however, is as to when a bye-law or any other delegated legislation can be said to be inconsistent with or repugnant to the parent Act or any general law and, therefore, bad. In *White v. Morley*¹⁸, Channel, L.J. stated: "A bye-law ... is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful."

(emphasis supplied)

Whether a particular piece of delegated legislation is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from various provisions of the enactment.

Thus, in *Tata Iron & Steel Co. v. Workmen*¹⁹, the relevant statute empowered the Central Government to frame the bonus scheme for employees. In exercise of the power, the Central Government created a quasi-judicial tribunal to decide certain disputes. Rejecting the contention that such a tribunal can only be created by the legislature and not by an executive fiat, the Supreme Court observed that it was a matter of detail "which is subsidiary or ancillary to the main purpose of the legislative measure for implementing the Scheme".

Similarly, in *State of T.N. v. Hind Store*²⁰, the parent Act empowered the State Government to make rules for regulating the grant of mining leases. Rule 8-C framed by the State Government *totally* prohibited quarrying in black granite by private enterprise. It was contended that the rule was *ultra vires* the parent Act and was, therefore, bad. Negating the contention and interpreting the connotation 'regulation' in a wider sense, the Supreme Court observed: "We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."

18. (1899) 1 QB 34 (39).

19. (1972) 1 SCC 383: AIR 1972 SC 1917.

20. (1981) 2 SCC 205: AIR 1981 SC 711.

In *Arlidge v. Islington Corpn.*²⁹, a bye-law made by a corporation required the landlord of a lodging house to cause the premises to be cleansed once a year, and penalty was imposed for breach of the said bye-law. The Court held the bye-law *ultra vires* as unreasonable, as the premises might have been leased by the landlord and he might be unable to carry out the work without committing trespass.

In the leading case of *Kruse v. Johnson*³⁰, in exercise of the power conferred by the parent Act on the County Council of Kent, a bye-law was made 'prohibiting any person from playing music or singing in any public place or highway within fifty yards of any dwelling-house'. It was held *ultra vires* on the ground that the same was unreasonable.

But the question is: when can a bye-law be said to be unreasonable? Lord Russell, C.J. propounds:

"If, for instance, they (bye-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, '*Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires*'. "³¹ (emphasis supplied)

But at the same time it should not be forgotten that such bye-laws must be 'benevolently construed' and they ought to be supported if possible. As Lord Russell says:

"A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient ... in matters which directly and mainly concern the people of the country who have the right to choose those whom they think best fitted to represent them in their local Government bodies, such representatives may be trusted to understand their own requirements better than judges." ³²

(b) India

The same principles are accepted in India also. In *Air India v. Nargesh Meerza*³³, a regulation framed by Air India providing for termination of services of an air hostess on her first pregnancy was held to be ex-

29. (1909) 2 KB 127.

30. (1898) 2 QB 91; 67 LJ QB 782; 79 LT 647.

31. *Id.* at pp. (99-100) (QB).

32. *Id.* at p. 100 (QB).

33. (1981) 4 SCC 335; AIR 1981 SC 1829.

tremely arbitrary, unreasonable, abhorrent to the notions of a civilized society and interfering with the ordinary course of human nature. It is "not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life".³⁴

Similarly, in *State of Maharashtra v. Chandrabhan Tale*³⁵, Rule 151(1)(ii)(b) of the Bombay Civil Services Rules, 1959 providing Re 1 as subsistence allowance after conviction of a government employee even if his appeal is pending is held to be 'unreasonable and void'. It also 'stultifies the right of appeal and is unfair and unconstitutional'. "The award of subsistence allowance at the rate of Re 1 per month can only be characterised as ludicrous."³⁶

Reference, however, requires to be made to two decisions of the Supreme Court. In *Trustees, Port of Madras v. Aminchand*³⁷, the Scale of Rates fixed by the Board was challenged as unreasonable. The High Court of Madras held that the Scale of Rates fixed by the Board was in the nature of bye-laws and they can be declared *ultra vires* if they are unreasonable. Disagreeing with the High Court, the Supreme Court observed: "Those who desire to avail of the services of the Board are liable to pay for those services at prescribed rates...."³⁸ Such scale of rates, therefore, according to the court, would not be subject to the test of reasonableness.

Similarly, in *S. Narayan Iyer v. Union of India*³⁹, the Supreme Court 'washed off its hands' from the task of scrutinising the reasonableness of the telephone rates fixed by the Government. None of the reasons put forward by the court was at all convincing. The court observed that a subscriber to a telephone has option to enter into a contract or not. But if he does so, he has to pay the rates and he cannot contend that the rates are not fair. But the court ignored the material fact that the Government has a monopoly to provide telephone service and if any person wants such service, he has to apply for it. It does not, however, empower the Government to fix any rates arbitrarily, capriciously or at its sweet will even though they are unreasonable. Such an argument was negated by the Supreme Court itself. In *Vaish Degree College v. Lakshmi Narain*⁴⁰ and in *Central Inland Water Transport Corpn. v. Brojo Nath Gan-*

34. *Id.* at p. 370 (SCC): 1852 (AIR).

35. (1983) 3 SCC 387: AIR 1983 SC 803.

36. *Id.* at p. 390 (SCC): 804 (AIR).

37. (1976) 3 SCC 167: AIR 1975 SC 1935.

38. *Id.* at p. 177 (SCC): 1941 (AIR).

39. (1976) 3 SCC 428: AIR 1976 SC 1986.

40. (1976) 2 SCC 58: AIR 1976 SC 888.

In *Supreme Court Employees' Welfare Assn. v. Union of India*²¹, the Supreme Court, after referring to a number of leading cases, observed: 'Where the validity of a subordinate legislation (whether made directly under the Constitution or a statute) is in question, the court has to consider the nature, objects and the scheme of the instruments as a whole, and, on the basis of that examination, it has to consider what exactly was the area over which, and the purpose for which, power has been delegated by the governing law.' In other words, the doctrine of 'pith and substance' which is applicable to Parliamentary Acts is applicable to delegated or subordinate legislation also.

iii) *Where delegated legislation is unconstitutional*

Sometimes a parent Act or delegating statute may be constitutional and valid and delegated legislation may be consistent with the parent act, yet the delegated legislation may be held invalid on the ground that it contravenes the provisions of the Constitution. It may seem paradoxical that a delegated legislation can be struck down on this ground because the parent Act is constitutional and delegated legislation is consistent with the parent Act, how can the delegated legislation be *ultra vires* the Constitution? It was precisely this argument which the Supreme Court was called upon to deal with in *Narendra Kumar v. Union of India*²².

In that case, the validity of the Non-Ferrous Metal Control Order, 1958 issued under Section 3 of the Essential Commodities Act, 1955 was challenged as unconstitutional. The petitioners had not challenged the validity of the parent Act. It was argued that if the enabling Act was not considered unconstitutional, the rules made thereunder could not be held to be unconstitutional. Rejecting this 'extravagant' argument, the Supreme Court held that even though a parent Act might not be unconstitutional, an order made thereunder (delegated legislation) can still be unconstitutional and can be challenged as violative of the provisions of the Constitution.

Das Gupta, J. rightly observed: "It is clear that when Section 3 confers powers to provide for regulation or prohibition of the production, supply or distribution of any essential commodity it gives such power to make any regulation or prohibition insofar as such regulation and prohibition do not violate any Fundamental Rights granted by the Constitution of India."²³

1. (1989) 4 SCC 187 (239): AIR 1990 SC 334 (336-67).

2. AIR 1960 SC 430: (1960) 2 SCR 375.

3. *Id.* at p. 433 (AIR).

Every order made under a statutory provision must not only be within the authority conferred by the statutory provision, but must also stand the test of constitutionality. Parliament cannot be presumed to have intended to confer power on an authority to act in contravention of constitutional provisions. It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of the Constitution.²⁴

In *Dwarka Prasad v. State of U.P.*²⁵, the U.P. Coal Control Order 1953 was issued under the Essential Supplies (Temporary Powers) Act 1946. Even though the parent Act was constitutional, Clause 3(2)(b) of the Order was held *ultra vires* by the Supreme Court being violative of Article 19(1) not (i)(g) of the Constitution of India. Similarly, Rule 10 of the Punjab Superior Judicial Service Rules, 1963 conferring power on the Governor to confirm District Judges was held *ultra vires* the provisions of Articles 233 and 235 of the Constitution of India.²⁶ Likewise a rule restricting voting right for the management of Jain temples to persons who had attained the age of 21 years, who had donated not less than Rs 500 to the temple and who were residing within the State for the last ten years was held discriminatory and, therefore, *ultra vires*.²⁷

(iv) Unreasonableness

(a) England

In England, it is well-settled that the bye-laws made by corporations, boroughs and other local bodies may be declared as *ultra vires* on the ground of unreasonableness. This rule is based on a presumed intention of the legislature that the Common Law allows them to make only reasonable bye-laws. This is an implied limitation on the exercise of powers by such authorities, and, therefore, if the power is not reasonably exercised, the action is bad in law. As de Smith²⁸ says, "... there is no reason of principle why a manifestly unreasonable statutory instrument should not be held to be *ultra vires* on that ground alone...."

(emphasis supplied)

24. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (314): AIR 1978 SC 597.

25. AIR 1954 SC 224: 1954 SCR 803.

26. *High Court of P&H v. State of Haryana*, (1975) 1 SCC 843: AIR 1975 SC 613.

27. *Labh Chandra v. State*, AIR 1975 Pat 206. For detailed discussion and conflicting decisions of the Supreme Court, see C.K. Thakker: *Administrative Law*, 1996, pp. 111-16.

28. *Judicial Review of Administrative Action*, 1980, pp. 354-55; see also Wade: *Administrative Law*, 1994, pp. 879-81.

*guly*⁴¹, the rule providing termination of services of a permanent employee before the age of superannuation was held to be unreasonable, opposed to public policy and a "Henry VIII clause". Recently, in *Indian Council of Legal Aid & Advice v. Bar Council of India*⁴², a rule framed by the Bar Council of India barring entry of persons who have completed 45 years of age from enrolment as advocates was held arbitrary and unreasonable.

(v) *Mala fide: Bad faith*

(a) *England*

In England, it is well-settled that an Act passed by the competent legislature cannot be questioned in court on the ground that the same was passed *mala fide* or with improper motive. Once it is held that the legislature was competent to pass such an Act, it is valid. But there is yet another principle: Whenever the legislature confers any legislative power on any administrative authority, the said power must be exercised in good faith by the latter and on proof of bad faith the court can hold the exercise of power *ultra vires*. In *R. v. Comptroller-General of Patents*⁴³, Clauson, J. observed:

"If, on reading the Order in Council making the regulation, it seems in fact that it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I agree that, on the face of the Order, it would be inoperative."⁴⁴

Again, from the observations of Lord Russell, C.J. in *Kruse v. Johnson*⁴⁵, it becomes clear that if a bye-law discloses bad faith, it may be held *ultra vires* by courts on that ground also.

(b) *India*

The Indian view is reflected in some observations in *Narendra Kumar v. Union of India*⁴⁶. In that case, while deciding the validity of the Non-Ferrous Metal Control Order, 1958, the Supreme Court observed: "*Mala fides have not been suggested and we are proceeding on the assumption that the Central Government was honestly of the opinion that....*"⁴⁷

(emphasis supplied)

41. (1986) 3 SCC 156; AIR 1986 SC 1571; see also *Delhi Transport Corpn. v. Mazdoor Congress*, 1991 Supp (1) SCC 600; AIR 1991 SC 101.

42. (1995) 1 SCC 732; AIR 1995 SC 691.

43. (1941) 2 KB 306.

44. *Id.* at p. 316.

45. (1898) 2 QB 91 (99-100); 67 LJ QB 782; 79 LT 647; see 'unreasonableness', (*supra*).

46. AIR 1960 SC 430; (1960) 2 SCR 375.

47. *Id.* at p. 433 (AIR).

From these observations an inference may be drawn that courts may consider the *mala fide* exercise of power by the statutory authority.

The point is now settled by the decision of the Supreme Court in *S. Shivdev Singh v. State of Punjab*⁴⁸. Under the Pepsu Tenancy and Agricultural Lands Act, 1955, rules were framed by the State Government. It was contended that the standards of yields prescribed in Schedule C under Rule 31 were arbitrary, unreasonable, unrealistic, unattainable and the same was in *mala fide* exercise of power by the statutory authority. Negating this contention, Wanchoo, J. (as he then was) observed:

“[I]f the standard fixed in Schedule C is to be taken to apply to the best quality irrigated land and that standard is reduced to 80 per centum in view of Rule 31(2), we would hesitate to say that Schedule C had fixed an unattainable standard and so was a *mala fide* exercise of power to frame rules with the object of defeating the intention of the legislature.”⁴⁹ (emphasis supplied)

However, in *Nagraj v. State of A.P.*⁵⁰, an Ordinance issued by the Andhra Pradesh Government reducing the age of superannuation of government employees from 58 years to 55 years was challenged, *inter alia*, on the ground of *mala fide* exercise of power. The Supreme Court rejected the contention observing that this kind of “*transferred malice*” is unknown in the field of legislation.

It is submitted that the above observations are very wide and do not lay down correct law. When a statute enacted by a competent legislature can be challenged as *mala fide*, there is no reason why a delegated legislation is immune from such challenge.

In *D.C. Wadhwa v. State of Bihar*⁵¹ the Supreme Court disapproved the practice of issuing Ordinances on a large scale being arbitrary and colourable exercise of power by the executive. Bhagwati, C.J. rightly stated: “If there is constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. *That would be clearly a fraud on the constitutional provision.*” (emphasis supplied)

48. AIR 1963 SC 365; (1963) 3 SCR 426.

49. *Id.* at p. 372 (AIR).

50. (1985) 1 SCC 523 (550); AIR 1985 SC 551; see also *L.N. Misra v. State of Bihar*, (1988) 2 SCC 433 (458); AIR 1988 SC 1136.

51. (1987) 1 SCC 378 (393); AIR 1987 SC 579 (589); *A.K. Roy v. Union of India*, (1982) 1 SCC 271; AIR 1982 SC 710; *Mittal v. Union of India*, (1983) 1 SCC 51; AIR 1983 SC 1. For detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 452-58.

(vi) *Sub-delegation*

This topic can be studied under three sub-heads:

- (a) Sub-delegation of legislative power.
- (b) Sub-delegation of judicial power.
- (c) Sub-delegation of administrative power.

(a) *Sub-delegation of legislative power*

As discussed above⁵², the maxim '*delegatus non potest delegare*' (a delegate cannot further delegate) applies to delegated legislation also and it is not possible for the delegate to sub-delegate the power conferred on him unless the parent Act authorises him to do so either expressly or by necessary implication. Assuming that the sub-delegation is permissible under the parent Act, what are the limitations and safeguards in this behalf? Here, the following propositions may be laid down:

(1) If the parent Act permits sub-delegation to officers or authorities not below a particular rank, then the power can be delegated only to those officers or authorities.

Thus, in *Ajaib Singh v. Gurbachan Singh*⁵³, under Section 3 of the Defence of India Act, 1962, the Central Government was empowered to make rules authorising detention of persons by an authority not below the rank of a District Magistrate. Section 40 authorised the State Government to delegate its powers to any officer or authority subordinate to it. The Supreme Court held that the power of detention could be sub-delegated to any officer not below the rank of a District Magistrate and the exercise of power to the Additional District Magistrate was illegal.

But even if there is no provision in the parent Act that the sub-delegation should be made to an officer or an authority not below a particular rank, the courts have taken the view that the power can be sub-delegated 'only to competent and responsible persons'.

(2) The sub-delegate cannot act beyond the power conferred on him by the delegate.

Thus, in *Blackpool Corpn. v. Locker*⁵⁴, under the Defence Regulations, 1939, the Minister was empowered to take possession of land. By issuing circulars, he sub-delegated this power to the Blackpool Corporation, as was within his powers. The circulars contained certain conditions and one of them was that furniture should not be requisitioned. The corporation requisitioned the defendant's dwelling house with furniture.

52. Lecture IV (*supra*).

53. AIR 1965 SC 1619; (1965) 2 SCR 845.

54. (1948) 1 KB 349; (1948) 1 All ER 85.

The Court of Appeal held the impugned action *ultra vires* since it went beyond the power conferred by the Minister on the Corporation.

(3) If some conditions are imposed by the delegate which must be complied with by the sub-delegate before the exercise of power, those conditions must be fulfilled; otherwise exercise of power will be *ultra vires*.

In *Radhakishan v. State*⁵⁵, under Section 4 of the Essential Supplies (Temporary Powers) Act, 1946, certain powers were sub-delegated by the Central Government to the Provincial Government subject to the condition that before making any order, concurrence of the former must be obtained by the latter. An order was passed by the Provincial Government without obtaining concurrence of the Central Government. The order was held *ultra vires* as the condition was not satisfied.

Similarly, in *Naraindas v. State of M.P.*⁵⁶, the Supreme Court held that if sub-delegation can be made through regulations, it could not be effected by passing a resolution.

(b) *Sub-delegation of judicial power*

In England⁵⁷ and in America⁵⁸, it is well-established that a judicial or quasi-judicial power conferred on a particular authority by a statute must be exercised by that authority and cannot be delegated to anyone unless such delegation is authorised by the statute either expressly or by necessary implication. In *Morgan (I) v. U.S.*⁵⁹, the Supreme Court of America held that the duty to decide cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is akin to that of a judge. '*The one who decides must hear.*' (emphasis supplied)

de Smith⁶⁰ says: "the maxim (*delegatus non potest delegare*) is applied with the utmost rigour to the proceedings of the ordinary courts, and in the entire process of adjudication a judge must act personally, except insofar as he is expressly absolved from his duty by statute. '*Only in very exceptional circumstances may judicial functions be sub-delegated in the absence of express authorisation.*' "⁶¹

(emphasis supplied)

55. AIR 1952 Nag 387.

56. (1974) 4 SCC 788; AIR 1974 SC 1232.

57. *Halsbury's Laws of England*, 4th Edn., Vol. 1, p. 34; de Smith: *Judicial Review of Administrative Action*, 1995, pp. 360-61; *Local Govt. Board v. Arlidge*, (1915) AC 120; 84 LJB 72; Wade: *Administrative Law*, 1994, pp. 352-54.

58. *Runkle v. U.S.*, (1887) 122 US 593.

59. (1936) 298 US 468 (481).

60. *Judicial Review of Administrative Action*, 1995, pp. 358-60.

61. *Id.* at p. 1079.

Lord Denning⁶² rightly states: "While an administrative function can often be delegated, a judicial function rarely can be; no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication."

The same principle is accepted in India as the basic principle.⁶³ In the words of Hidayatullah, J. (as he then was) in *Bombay Municipal Corpn. v. Thondu*⁶⁴, "it goes without saying that judicial power cannot ordinarily be delegated unless the law expressly or by clear implication permits it". In the historic case of *Gullapalli Nageswara Rao v. A.P.S.R.T.C.*⁶⁵, under the relevant Act and the Rules the Minister was empowered to hear the parties and to pass the final order, but he delegated his function of hearing to his Secretary, who heard the parties and put up a note before the Minister for final decision and the order was passed by the Minister. Quashing the orders, passed by the Minister, Subba Rao, J. (as he then was) held that it was not a judicial hearing. "If one person hears and another decides, personal hearing becomes an empty formality."

At the same time, practical difficulties must also be appreciated. It is not possible for all judicial and quasi-judicial authorities to take the entire evidence in all cases, hear the parties and their representatives or advocates, and give decisions. In these circumstances courts have allowed some relaxation and held that it is permissible for judicial or quasi-judicial bodies to delegate certain functions, e.g. holding of inquiries, taking of evidence, hearing of parties and to appoint assistants for the said purposes, *provided always* that after receiving evidence in the aforesaid manner they give an opportunity to the parties to clarify their stand before a decision is finally arrived at by them.

It is submitted that the following observations of Mahajan, J. (as he then was) in the leading case of *Delhi Laws Act, 1912, Re*⁶⁶, lay down correct law on the point, wherein His Lordship stated:

"No public functionary can himself perform all the duties he is privileged to perform, unaided by agents and delegates, but from this circumstance it does not follow that he can delegate the exercise of his judgment and discretion to others.... [T]he Judges are not allowed

62. *Barnard v. National Dock Labour Board*, (1953) 1 All ER 113, (1118-19): (1953) 2 QB 18; (1953) 2 WLR 995.

63. *Sahni Silk Mills v. ESI Corpn.*, (1994) 5 SCC 346(352).

64. AIR 1965 SC 1486 (1488): (1965) 2 SCR 929 (932).

65. AIR 1959 SC 308 (327): 1959 Supp (1) SCR 319.

66. AIR 1951 SC 332: 1951 SCR 747.

to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case."⁶⁷ (emphasis supplied)

(c) *Sub-delegation of administrative power*⁶⁸

(vii) *Exclusion of judicial review*

As discussed above, the validity of a delegated legislation can be challenged in a court of law. As early as 1877 in *Empress v. Burah*⁶⁹, the High Court of Calcutta had declared Section 9 of Act XXII of 1869 *ultra vires*. Though the decision of the Calcutta High Court was reversed by the Privy Council⁷⁰, neither before the High Court nor before the Privy Council it was contended that the court had no power of judicial review and, therefore, cannot decide the validity of the legislation. But sometimes, attempts are made by the legislature to limit or exclude judicial review of delegated legislation. Thus, in an Act a provision may be made that rules, regulations, bye-laws, etc. made under it "shall have effect as if enacted in the Act", "shall be conclusive evidence", "shall not be called in question in any court", "shall not be called in question in any legal proceedings whatsoever" and the like. The question is whether in view of these provisions judicial review of delegated legislation is ousted?

In *Institute of Patent v. Lockwood*⁷¹, Lord Herschell observed that the jurisdiction of courts to question the validity of delegated legislation could be taken away. But this view was disapproved subsequently by the House of Lords in *Minister of Health v. R., ex p Yaffe*⁷². In that case Lord Dunedin observed: "It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether ... it is repugnant to common sense that the order would be protected...." In that case it was held that since the order was in conflict with the provisions of the Act, it was not an order within the meaning of the Act and was not saved by the clause (shall have effect as if enacted in this Act). According to Allen⁷³, the words 'as if enacted in the Act' do not preclude judicial consideration of 'vires'.

67. AIR 1951 SC 332 at 386; see also *Pradyat Kumar v. Chief Justice of Calcutta*, AIR 1956 SC 285(291); *Marathwada University v. Seshrao*, (1989) 3 SCC 132; AIR 1989 SC 1582.

68. For detailed discussion see Lecture VIII (*infra*).

69. ILR 3 Cal 64; 1 CLR 161 (FB).

70. *Queen v. Burah*, (1878) 3 AC 889; 5 IA 178; 4 Cal 172 (PC).

71. (1894) AC 347; 63 LJPC 75; 71 LT 205.

72. (1931) AC 494 (501-02); 100 LJKB 306; 145 LT 98.

73. *Law and Orders*, 1965, p. 258.

The Committee on Ministers' Powers had also not favoured such clauses and has made the following recommendation:

"The use of clauses designed to exclude the jurisdiction of the Courts to enquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the ministerial memorandum attached to the Bill."⁷⁴

The aforesaid clauses have been used in many statutes in India, but their legal effect is not free from doubt. In some cases, the Supreme Court has adopted the *Herschell doctrine*⁷⁵, while in some cases like *Yaffe*⁷⁶ is followed.

In *Chief Inspector of Mines v. K.C. Thapar*⁷⁷, speaking for the Supreme Court, Das Gupta, J. observed: "The true position appears to be that the Rules and Regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction they are to be treated as if contained in the Act their true nature as subordinate rules is not lost."⁷⁸

It is submitted that the following observations of Shah, J. (as he then was) in the case of *State of Kerala v. Abdulla & Co.*⁷⁹, lay down correct law on the point:

"Validity of a rule whether it is declared to have effect as if enacted in the Act or otherwise is always open to challenge on the ground that it is unauthorised."⁸⁰ (emphasis supplied)

It is submitted that the above view is correct particularly when under the Constitution of India the doctrine of judicial review is accepted and treated as basic structure and essential feature of the Constitution which cannot be taken away by any statutory provision or even by a constitutional amendment.

74. Report of the Committee on Ministers' Powers, (1932), p. 65.

75. *Subba Rao v. CIT*, AIR 1956 SC 604: 1956 SCR 577; *Orient Weaving Mills v. Union of India*, AIR 1963 SC 98: 1962 Supp (3) SCR 481.

76. *Chief Commr. of Ajmer v. Radhe Shyam*, AIR 1957 SC 304: 1957 SCR 68; *Chief Inspector of Mines v. K.C. Thapar*, (*infra*); *State of Kerala v. Abdulla & Co.*, (*infra*).

77. AIR 1961 SC 838: (1962) 1 SCR 9.

78. *Id.* at p. 845 (AIR).

79. AIR 1965 SC 1585: (1965) 1 SCR 601.

80. *Id.* at p. 1589 (AIR).

(viii) *Retrospective operation*

It is well-settled that delegated legislation cannot have any retrospective effect unless such a power is conferred on the rule-making authority by the parent Act. The legislature can always legislate prospectively as well as retrospectively subject to the provisions of the Constitution. But the said rule will not apply to administrative authorities exercising delegated legislative power. Some statutes specifically confer power to the rule-making authority to frame rules with retrospective effect.⁸¹

The danger of conceding such a wide power to a delegated authority should not be overlooked. In *Howell v. Falmouth Boat Construction Co. Ltd.*⁸², a licence was issued which was to operate retrospectively so as to cover the works already done under the oral sanction of the authority. Holding this to be invalid, the House of Lords observed:

"It would be a dangerous power to place in the hands of Ministers and their subordinate officials to allow them, whenever they had power to licence, to grant the licence *ex post facto*; and a statutory power to licence should not be construed as a power to authorise or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction."⁸³

The same principle is accepted in India. In *State of M.P. v. Tikamdas*⁸⁴, the Supreme Court observed: "There is no doubt that unlike legislation made by a sovereign legislature, *subordinate legislation made by a delegate cannot have retrospective effect unless the rule-making power in the concerned statute expressly or by necessary implication confers powers in this behalf.*"⁸⁵

(emphasis supplied)

Thus, in *Vijayalakshmi Rice Mills v. State of A.P.*⁸⁶, the Court held that in the absence of express words or appropriate language from which

81. For instance, S. 295(4) of the Income Tax Act, 1961 reads as under:—

"The power to make rules conferred by this section shall include the power to give retrospective effect, from a date not earlier than the date of commencement of this Act, to the rules or any of them and, unless the contrary is permitted (whether expressly or by necessary implication); no retrospective effect shall be given to any rule so as to prejudicially affect the interest of assesseees)".

See also S. 46, Gift Tax Act, 1958; S. 85, Estate Duty Act, 1963; S. 184-A, Navy Act, 1957; S. 36-A, Administrative Tribunals Act, 1985.

82. (1951) AC 837: (1951) 2 All ER 278.

83. *Id.* at p. 847 (AC).

84. (1975) 2 SCC 100(103): AIR 1975 SC 1429(1431).

85. *Id.*, at p. 103 (SCC): 1431 (AIR).

86. (1976) 3 SCC 37: AIR 1976 SC 1471.

retrospectivity may be inferred, a notification takes effect from the date on which it is issued and not from any prior date.

Similarly, in *Gurcharan Singh v. State*⁸⁷, delegated legislation was held invalid. A fresh order was passed and a clause has been added that anything done or action taken under the old order should be deemed to have been taken under the new order. The court declared the said clause invalid since it was retrospective.

It is well-settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with retrospective effect. But in the leading case of *B. S. Yadav v. State of Haryana*⁸⁸, the Supreme Court rightly observed:

“It should also be realised that giving retrospective effect to the rules creates frustration and discontentment since the just expectations of the officers are falsified. Settled seniority is thereby unsettled, giving rise to long drawn-out litigation between the promotees and direct appointees. That breeds indiscipline and draws the High Court into the arena, which is to be deprecated.”⁸⁹

Again, no retrospective effect can be given to a delegated legislation which deprives a person of an accrued right vested in him.

In *Nachane v. Union of India*⁹⁰, the Supreme Court held that retrospective amendment in Life Insurance Corporation of India Class III and IV Employees (Bonus and Dearness Allowance) Rules, 1981 cannot nullify the effect of the writ issued by the court in an earlier case.

In *State of Gujarat v. Raman Lal*⁹¹, the High Court held that panchayat employees were government servants. The State carried the matter to the Supreme Court. During the pendency of the appeal, the Act was amended with retrospective effect nullifying the decision of the High Court.

Holding the Act *ultra vires*, the Court stated: “A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.... *Past virtue (constitutional) cannot*

87. AIR 1974 P&H 223.

88. 1980 Supp SCC 524: (1981) 1 SCR 1024.

89. *Id.* at p. 558 (SCC): 1070 (SCR).

90. (1982) 1 SCC 205: AIR 1982 SC 1126.

91. (1983) 2 SCC 33: AIR 1984 SC 161.

be made to wipe out present vice (constitutional) by making retrospective laws.'⁹² (emphasis supplied)

It is submitted that the following observations of Grover, J. in the case of *ITO v. Poonnoose*⁹³ lay down correct law on the point:

"The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But *where no such language is to be found* it has been held by the courts that *the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect.*"⁹⁴ (emphasis supplied)

(d) *Ultra vires* act: Effect

An action which is *ultra vires* is without jurisdiction, null and void, and of no legal effect whatsoever. It has no legal leg to stand on.⁹⁵ Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing had happened. There is no question of estoppel against an *ultra vires* act. A plea of *ultra vires* cannot be defeated by a rule of estoppel. It has been rightly said: "It would entirely destroy the whole doctrine of *ultra vires* if it were possible for the donee of a statutory power to extend his power by creating an estoppel."⁹⁶ The question of approbate and reprobate also does not apply in such a case. No question of acquiescence or waiver can be raised against an *ultra vires* act. In *Lohia Machines Ltd. v. Union of India*⁹⁷, the Supreme Court has observed: "If a rule made by a rule-making authority is outside the scope of its power, it is void and it is not at all relevant that its validity has

92. (1983) 2 SCC 33 at 62: 177 (AIR): see also *T.R. Kapur v. State of Haryana*, 1986 Supp SCC 584; AIR 1987 SC 516; *Haribans v. Rly. Board*, (1989) 2 SCC 84; AIR 1989 SC 696; *Raj Soni v. Air Officer Incharge Admn.*, (1990) 3 SCC 261; AIR 1990 SC 1305.

93. (1969) 2 SCC 351; AIR 1970 SC 385.

94. *Id.* at p. 354 (SCC): 387 (AIR). For other cases, see C.K. Thakker: *Administrative Law*, 1996, pp. 134-37.

95. Lord Greene in *Minister of Agriculture v. Mathews*, (1950) 1 KB 148 (153); (1949) 2 All ER 724.

96. (1985) 2 SCC 197 (223); AIR 1985 SC 421.

97. (1985) 2 SCC 197; AIR 1985 SC 421.

not been questioned for a long period of time; *if a rule is void it remains void whether it has been acquiesced or not.*" (emphasis supplied)

But in *Sahni Silk Mills v. ESI. Corpn.*⁹⁸, the parent Act enabled the Corporation to delegate its power to the Director General who in turn sub-delegated that power to Regional Directors. Regional Directors in exercise of the power recovered damages, which action was challenged. Though sub-delegation was held invalid, the Supreme Court did not direct refund of amounts already realised as damages from the employers. Thus, the Court virtually applied *de facto* doctrine observing that it was not in public interest to do so.

It is submitted that the following observations of Lord Denning, M.R. lay down correct law on the point:

"Next, it was suggested that, even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager, but, if the board have no power to delegate their functions to the port manager, they can have no power to ratify what he has already done. *The effect of ratification is to make it equal to a prior command, but as a prior command, in the shape of delegation, would be useless, so also is a ratification.*"⁹⁹ (emphasis supplied)

(B) Procedural ultra vires

(a) Definition

When a subordinate legislation fails to comply with certain procedural requirements prescribed by the parent Act or by the general law, it is known as procedural *ultra vires*.

(b) Principle explained

While framing rules, bye-laws, regulations, etc., the parent Act or enabling statute may require the delegate to observe a prescribed procedure, such as holding of consultations with particular bodies or interests, publication of draft rules or bye-laws, laying them before Parliament, etc. It is incumbent on the delegate to comply with these procedural requirements and to exercise the power in the manner indicated by the legislature. Failure to comply with the same *may* invalidate the rules so framed. But at the same time, it is also to be noted that failure to observe the procedural requirements does not *necessarily* and *always* invalidate the rules. This arises out of a distinction between *mandatory* requirements

98. (1994) 5 SCC 346.

99. *Barnard v. National Dock Labour Board*, (1953) 1 All ER 1113 (1119); (1953) 2 QB 18; see also *Bar Council of India v. Surjeet Singh*, (1980) 4 SCC 211; AIR 1980 SC 1612.

and *directory* requirements. In this book, though we are not concerned with the distinction between the two, we may say that *generally*, non-compliance with a directory provision does not invalidate subordinate legislation, but failure to observe a mandatory and imperative requirement does. "It is a well-settled rule that an absolute enactment must be obeyed or fulfilled *exactly*, but it is sufficient if a directory enactment be obeyed or fulfilled *substantially*."¹

(c) *Requirements*

The following two procedural requirements may now be discussed:

(1) Publication.

(2) Consultation.

(1) *Publication*

(i) *Object*

It is a fundamental principle of law that 'ignorance of law is no excuse' (*ignorantia juris non excusat*), but there is also another equally established principle of law that the public must have access to the law and they should be given an opportunity to know the law. According to Wade², "the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public—in the sense, of course, at any rate, its legal advisers have access to it, at any moment, as of right." As observed by Domat³, "all laws ought either to be known or at least laid open to the knowledge of all the world in such a manner, that no one may with impunity offend against them, under pretence of ignorance". In the case of an Act made by Parliament this poses little difficulty as it receives sufficient publicity during the introduction of a Bill, printing, reference to a Select Committee and its report thereon, reading before the House or Houses, discussion, voting, final approval of the Bill, radio and newspaper reports thereon, etc. But this is not true in the case of delegated legislation. As Roscoe Pound⁴ observes, "the first knowledge that those affected have of a rule, is usually after it has gone into effect. The first opportunity they have to challenge it, is usually, after it is enforced against them". M.P. Jain⁵ rightly stated: "It is essential, therefore, that adequate means are adopted to publicize delegated

1. *Raza Buland Sugar Co. v. Rampur Municipal Council*, AIR 1965 SC 895: (1965) 1 SCR 970; *Pratap Singh v. Shri Krishna Gupta*, AIR 1956 SC 140: (1955) 2 SCR 1029.

2. *Administrative Law*, 1994, p. 890.

3. Quoted by Ganguly: *Administrative Legislation*, 1968, p. 74.

4. Quoted by S. Rajgopalan: *Administrative Law*, 1970, p. 107.

5. *Treatise on Administrative Law*, 1996, Vol. 1, p. 150.

legislation so that people are not caught on the wrong foot in ignorance of the rules applicable to them in a given situation. The system of publication ought to be such that delegated legislation is not only made known to the people, but it is also easy to locate as and when necessary."

(ii) *England*

In England, by the Rules Publication Act, 1893, certain provisions were made for the giving of notice and inviting representations from interested public bodies. Under the Statutory Instruments Act, 1946, certain provisions were made with a view to ensure that the public would be aware of the delegated legislation.

In *Johnson v. Sargant*⁶, the impugned order was passed on May 16, but was published on May 17. The court held that the order could come into operation only on May 17, i.e. when it was made known.

Though Prof. C.K. Allen⁷ criticises this decision and describes it as 'a bold example of a judge-made law, soundness of which is very doubtful', in subsequent cases also, the same principle has been followed.

(iii) *U.S.A.*

Before 1935, there was no machinery for publication of delegated legislation in the U.S. and there was hardly any opportunity for affected persons to get information about it. But after the decision in the *Panama case*⁸ (wherein, the court found that there was no adequate publication of delegated legislation), the Federal Register Act was passed in 1935, requiring publication of all regulations. The provisions for publicity of delegated legislation were further strengthened by enacting the Administrative Procedure Act, 1946.

Thus, in *Hotch v. U.S.*⁹, a Circuit Court held that if a regulation was not published in accordance with the Act of 1935, it was invalid, irrespective of whether the person charged with its contravention had actual knowledge of its contents or not.

On the other hand, in *Federal Crop Insurance Corp. v. Merrill*¹⁰, a regulation was published in the *Federal Register* in accordance with the Act of 1935 and 'in spite of the conceded fact' that the farmer knew nothing about the regulation, the U.S. Supreme Court by majority held the regulation valid and binding on him. Justice Jackson (dissenting) observed:

6. (1918) 1 KB 101.

7. *Law and Orders*, 1965, p. 112.

8. *Panama Refining Co. v. Ryan*, (1934) 293 US 388.

9. (1954) 212 F 2d 280.

10. (1947) 332 US 380.

“To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the *Federal Register* contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops.”¹¹

It is submitted that though factually what Justice Jackson says is true, the court was required to decide the question in accordance with law and the majority view was, therefore, correct. In India, the same principle is followed.

(iv) *India*

The above principles apply in India also. Unlike England and America, there is no statutory provision requiring publication of delegated legislation. Yet the courts have treated some sort of publication of delegated legislation as an essential requirement for its validity.

(v) *Directory or mandatory*

Is the requirement of prior publication of delegated legislation mandatory? What will be the effect of non-compliance with this requirement? What is the effect in defect of publication of delegated legislation? These are some of the problems which are not free from doubt. Let us consider them in the light of decided cases.

In *Harla v. State of Rajasthan*¹², the legislation in question passed by the Council was neither published nor was it made known to the general public through any other means. Holding its publication necessary and applying the principles of natural justice, the Supreme Court observed:

“The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. *Promulgation or publication of some reasonable sort is essential.*”¹³

(emphasis supplied)

¹¹ *Id.* at p. 387.

¹² AIR 1951 SC 467; 1952 SCR 110.

¹³ *Id.* at p. 468 (AIR).

Again, in *Narendra Kumar v. Union of India*¹⁴, Section 3 of the Essential Commodities Act, 1955 required all the rules to be made under the Act to be notified in the Official Gazette. The principles applied by the licensing authority for issuing permits for the acquisition of non-ferrous metals were not notified. The Supreme Court held the rules ineffective.

However, in *State of Maharashtra v. M.H. George*¹⁵, a notification, dated November 8, 1962 was published in the Gazette of India on November 24, 1962, prohibiting import of gold in India except on certain conditions. The respondent left Zurich on November 27, carrying gold with him and was arrested at the Bombay airport on November 28. He pleaded his ignorance of the notification. Negating the contention the Supreme Court held that the notification had been published and made known in India and the ignorance pleaded by the respondent-accused was wholly irrelevant.

The majority observed: "[P]ublication in the Official Gazette, viz. the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned.... [T]he notification by the Reserve Bank was published in the Gazette of India on November 24, 1962 and hence ... the notification must be deemed to have been published and brought to the notice of the concerned individuals on the 25th of November, 1962."¹⁶

(vi) *Mode of publication*

A question may also arise about the mode, manner and method of publication. As a rule, a distinction must be drawn between publication of delegated legislation and the *mode, manner or method* of publication. Even if a requirement of publication is held to be mandatory, the mode or manner of publication may be held to be directory and strict compliance thereof may not be insisted upon. In the oft-quoted passage from the judgment in *Raza Buland Sugar Co. v. Rampur Municipal Council*¹⁷, speaking for the Supreme Court, Wanchoo, J. (as he then was) observed:

"The question whether a particular provision of a statute which on the face of it appears mandatory — inasmuch as it uses the word 'shall' as in the present case — or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the

14. AIR 1960 SC 430: (1960) 2 SCR 375.

15. AIR 1965 SC 722: (1965) 1 SCR 123.

16. *Id.* 743 (AIR).

17. AIR 1965 SC 895: (1965) 1 SCR 970.

provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.¹⁸

In *Raza Buland Sugar Co.*, the Supreme Court held that the statutory provision requiring publication of rules before imposition of tax was mandatory, but the manner in which the rules were required to be published was directory, and as there was substantial compliance with the requirement of publication, the rules were valid. On the other hand, in *Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee*¹⁹, the notification was issued under the parent Act (Gujarat Agricultural Produce Markets Act, 1964) and was required to be published in Gujarati in a newspaper being circulated in that area. The Supreme Court held that the requirement of publication in Gujarati was mandatory and as the same was not complied with, the notification was invalid.

(vii) Effect of publication

Once the delegated legislation is promulgated or published, it takes effect from the date of such promulgation or publication. In *M.H. George*²⁰ the Supreme Court held that the notification became effective from November 24, 1962 when it was published in the Government Gazette. In *Pankaj Jain Agencies v. Union of India*²¹, the notification was published in the Government Gazette on February 13, 1986 prescribing the rates of custom duty which were to come in force from February 19, 1986. The notification was held valid.

(viii) Defect in publication

In some statutes, a provision is made that no act done or proceeding taken under the Act shall be called in question merely on the ground of any defect or irregularity in such act or proceeding, not affecting the merits of the case. Relying on such provisions, the Supreme Court has

18. *Id.* at p. 899 (AIR).

19. (1975) 2 SCC 482; AIR 1976 SC 273.

20. AIR 1965 SC 722; (1965) 1 SCR 123.

21. (1994) 5 SCC 198; AIR 1995 SC 360; see also *Sonik Ind. v. Rajkot Municipal Council*, (1986) 2 SCC 608; AIR 1986 SC 1518; *Srinivasan v. State of Karnataka*, (*infra*).

held that failure of proper publication does not invalidate the act.²² In *Srinivasan v. State of Karnataka*²³, such 'Omnibus Curative Clause' has been described as the *Ganga*²⁴ clause.

(ix) *Conclusions*

The necessity and need of the publication of subordinate or delegated legislation cannot, however, be underestimated. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's 'Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. Delegated or subordinate legislation is all-pervasive and there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important, if not more important, than governance by Parliamentary legislation. But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation.²⁵

It is submitted that the following observations of Chinnappa Reddy, J. in *Srinivasan v. State of Karnataka*²⁶, lay down correct law on the point, and are, therefore, worth quoting:

"Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel.

22. *Berar Swadeshi Vanaspathi v. Municipal Committee, Shegaon*, AIR 1962 SC 420; (1962) 1 SCR 596; *Bangalore Woollen, Cotton and Silk Mills v. Corpn. of Bangalore*, AIR 1962 SC 562; (1961) 3 SCR 707; *Municipal Board, Hapur v. Raghuvendra*, AIR 1966 SC 693; (1966) 1 SCR 950; *Municipal Board, Sitapur v. Prayag Narayan*, (1969) 1 SCC 399; AIR 1970 SC 58.

23. (1987) 1 SCC 658; AIR 1987 SC 1059.

24. According to the belief of Hindu religion, the holy water of river Ganga purifies and cleanses all sins of a person who takes a bath in it.

25. *Srinivasan v. State of Karnataka* (*infra*).

26. (1987) 1 SCC 658; AIR 1987 SC 1059.

namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."²⁷

(2) Consultation

(i) Meaning

The term 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or, at least satisfactory solution of a problem. It is a process which requires meeting of minds between the parties to consultation on material facts to come to a right conclusion.²⁸

(ii) Object

An important measure to check and control the exercise of legislative power by the executive is the technique of consultation through which affected interests may participate in the rule-making process. This *modus operandi* is regarded as a valuable safeguard against misuse of legislative power by the executive authorities. As Wade and Philips²⁹ remark: "One way of avoiding a clash between department exercising legislative powers and the interest most likely to be affected is to provide for some form of consultation." This process of exchange of ideas is beneficial to both: to the affected interests itself insofar as they have an opportunity to impress on the authority their point of view; and to the rule-making authority insofar as it can gather necessary information regarding the issues involved and thus be in a better position to appreciate a particular situation. The Administration is not always the repository of ultimate wisdom; it learns from the suggestions made by outsiders and often benefits from that advice.³⁰

(iii) Nature and scope

Consultation does not mean consent or concurrence. At the same time, however, it postulates full and effective deliberation, exchange of mutual viewpoints, meeting of minds and examination of relative merits of the other point of view. Consultation is not complete unless

27. *Id.* at pp. 672-73 (SCC): 1067-68 (AIR).

28. *Union of India v. S.H. Sheth*, (1977) 4 SCC 193; AIR 1977 SC 2328; *S.P. Gupta v. Union of India*, 1981 Supp SCC 87; AIR 1982 SC 149; *Supreme Court Advocates on Record Assn. v. Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268.

29. *Constitutional Law*, 1960, p. 584.

30. M.P. Jain: *Treatise on Administrative Law*, (1996), Vol. 1, p. 164.

the parties thereto make their respective viewpoints known to others and examine relative merits of their views. Even when consultation is not a legal requirement, such a step generates greater confidence of the persons who may be affected by an action that may be taken by the authority.³¹

(iv) *England*

In England, though there is no statutory provision requiring consultation of affected interests before the making of subordinate legislation, it is considered mandatory. This practice is so well-established that "no Minister in his senses, with the fear of Parliament before his eyes would ever think of making regulations without (where practicable) giving the persons who will be affected thereby or their representatives an opportunity of saying what they think about the proposal".³² Sir Cecil Carr³³ enunciates:

"It is unthinkable that any important rules would be made about solicitors in England without consulting the Law Society or about doctors, without consulting the British Medical Association, or about local Government without consulting the County Council Association and the Association of Municipal Corporations."

With regard to the absence of statutory provisions requiring consultation, the Lord Chancellor says: "We no longer promulgate the regulations or rules in the Gazette and wait for representations to be made. We go to the trade or interest concerned and deal with it by getting them round the table, hearing what they have to say, and then drafting the rules after obtaining their views."

According to Griffith³⁴, such consultations are of two types:

- (1) Ordinary types of consultation, and
- (2) Extraordinary types of consultation.

(1) **Ordinary types of consultation.**—These can be further subdivided into two categories:

(A) *Individual Objections.*—Generally, consultations of this kind are by statutory provisions, e.g., factory laws. The proposed regulations

31. *Prakash Chand v. Zila Parishad*, (1971) 2 SCC 489 (499); AIR 1971 SC 1696; *Lakshmi Khandsari v. State of U.P.*, (1981) 2 SCC 600 (633); AIR 1981 SC 873; *State of J&K v. Zakki*, 1992 Supp (1) SCC 584; AIR 1992 SC 1546.

32. Sir W. Graham cited by Griffith: *Delegated Legislation, Some Recent Developments*, (1949) 12 Mod LR 297.

33. Cited by Griffith: *Concerning English Administrative Law*, p. 54.

34. *Concerning English Administrative Law*, p. 54.

are required to be published, objections are invited and opportunity of hearing is given to the affected persons.

(B) *Consultation with specified interests.*—Here the Minister is required to consult specified interests before he makes the regulations. Normally, these interests are statutory advisory bodies or local authorities, e.g. Traffic Advisory Committee, Merchant Shipping Advisory Committee, etc.

(2) **Extraordinary types of consultation.**—These can also be subdivided into two categories:

(A) *Preparation by affected interests.*—Here the power to draft the regulations is delegated to the individual or group and the Minister becomes a confirming or approving authority. Under certain factory laws, the power of making rules to compel the observance of requirements of the laws regarding cleanliness, ventilation and general health matters is delegated to the occupier of the factory.

(B) *Approval by Statutory Body.*—Some statutes provide for submission of the draft of the regulations to a statutory body by the Minister and the report of that body is to be laid before Parliament. The effect is that either the Minister must accept the report with its proposed amendments or defend his action of refusal in Parliament.

(v) *U.S.A.*

The technique of prior consultation is very much common in the United States. The Administrative Procedure Act, 1946 makes detailed provisions for consultation requiring that interested parties should be given an opportunity to participate in the rule-making process. In some cases Congress has prescribed even a formal hearing. Persons likely to be affected are afforded an opportunity by the rule-making authority to participate in the rule-making process. The agency will consider the written data, views, arguments, etc. of those persons and finalise the rules. Hearings preliminary to rule-making have thus become an important part of the administrative process in the United States. When formal hearings are held, they are almost like judicial proceedings.³⁵

(vi) *India*

In India, there is no general statutory provision requiring consultation with the affected interests in the making of delegated legislation. But

³⁵ Wade, *Administrative Law*, 1994, pp. 895-96.

some statutes specifically provide for consultation which fall under the following heads.³⁶

(1) **Official consultation.**—The rule-making power is delegated subject to a stipulation that it is to be exercised in consultation with a named official authority or agency, e.g. the Central Government is required to make rules under Section 52 of the Banking Companies Act, 1949 after consulting the Reserve Bank of India.

(2) **Consultation with Statutory Bodies.**—In certain statutes, the rule-making power is conferred on the Central Government which can be exercised after consulting the Boards concerned, e.g. the Central Government is empowered to make rules under Sections 6 and 12 of the Drugs Act, 1940 after consulting the Drugs Technical Advisory Board.

(3) **Consultation with Advisory Bodies.**—Under some statutes, advisory bodies are constituted to assist the Central Government or other subordinate authorities in framing rules. Thus, Mining Boards are constituted under the Indian Mines Act, 1901 to assist and advise the Government in making rules.

(4) **Draft Rules by Affected Interests.**—In some cases, the power to frame rules is directly conferred on the affected interests, e.g. under Section 61 of the Indian Mines Act, 1961, the power is conferred on the owner of a mine to frame and submit to the Inspector of Mines a draft of bye-laws for the prevention of accidents and for the safety, convenience and discipline of those employed in the mine. Ultimately, the draft rules may be approved by the Central Government after hearing affected interests.

(vii) *Failure to consult: Effect*

As discussed above, in England, the position requiring consultation has generally been regarded as mandatory. In *Rollo v. Minister of Town and Country Planning*³⁷, holding the consultation as 'an important statutory obligation', Bucknill, L.J. observed:

"On the one side the Minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity must be given to the local authority to tender that advice."

36. *Delegated Legislation in India*, ILI, 1964, pp. 42-49.

37. (1948) 1 All ER 13 (17).

In India, provisions regarding consultation were held to be directory in some cases. Thus, in *Ibrahim v. Regional Transport Authority*³⁸, consultation with the Municipality was required to be made by the Transport Authority before certain routes for public buses were fixed. The Supreme Court held it to be merely directory.

Similarly, in *Hindustan Zinc Ltd. v. Andhra Pradesh State Electricity Board*³⁹, the Apex Court held that failure on the part of the Board to consult the Electricity Council before revising electricity tariffs was not bad. One of the factors considered by the Court was that the consequence of non-compliance was not provided by the Act and, hence, at the most such consultation could be said to be persuasive.

On the other hand, in *Banwarilal v. State of Bihar*⁴⁰, the Supreme Court held that the provision under Section 59 of the Mines Act requiring consultation with the Mining Boards by the Central Government before framing regulations was mandatory.

In *Union of India v. S.H. Sheth*⁴¹, in a different context, however, while considering the legality of an order of transfer of a High Court Judge under Article 222 of the Constitution of India, the Supreme Court has elaborately discussed the requirement of consultation.

(viii) Concluding remarks

In *New India Industrial Corpn. v. Union of India*⁴², Wad, J. states: "Consultation of interest infuses law-making process with democratic forms, particularly in what is called Bureaucratic legislation. Apart from this, it is an administrative necessity. Effective and meaningful administration is impossible without imaginative administrative process. If the citizens are to receive the advantage of any beneficent measures of the administration, the administrative process should be such that the benefit reaches the citizen in full measure and with expedition." M.P. Jain⁴³ rightly observes: "A consultative technique is useful in balancing individual interests and administrative exigency.... *The consultative process can be a salutary safeguard against improper use of power of delegated legislation as it infuses democratic norms in bureaucratic legislation.*" (emphasis supplied)

38. AIR 1953 SC 79: 1953 SCR 290.

39. (1991) 3 SCC 299: AIR 1991 SC 1473.

40. AIR 1961 SC 849: (1962) 1 SCR 33.

41. (1977) 4 SCC 193: AIR 1977 SC 2328; see also *State of U.P. v. Manbodhan*, AIR 1957 SC 912: 1958 SCR 533; *Laxmi Khandsari v. State of U.P.*, (1981) 2 SCC 600: AIR 1981 SC 873 (para 86).

42. AIR 1980 Del 277 (282).

43. *Treatise on Administrative Law*, 1996, pp. 163-64.

3. LEGISLATIVE CONTROL

(a) General

It is of course open to Parliament to confer legislative power upon anyone it likes, including the captain of an English cricket team, or to the author of administrative law.⁴⁴ But if Parliament delegates legislative powers to any other authority, e.g. to the executive, it must also see those powers are properly exercised by the administration.

With regard to the control of the legislature over delegated legislation, M.P. Jain⁴⁵ states: "In a parliamentary democracy it is the function of the Legislature to legislate. If it seeks to delegate its legislative power to the Executive because of some reasons, it is not only the right of the Legislature, but also its obligation, as principal, to see how its agent i.e. the Executive carries out the agency entrusted to it. Since it is the legislature which grants legislative power to the Administration, it is primarily its responsibility to ensure the proper exercise of delegated legislative power, to supervise and control the actual exercise of this power, and ensure against the danger of its objectionable, abusive and unwarranted use by the administration."

(b) Object

Thus, the underlying object of parliamentary control is to keep watch over the rule-making authorities and also to provide an opportunity to criticise them if there is abuse of power on their part.⁴⁶

(c) Modes

Legislative control can be effectively exercised by:

- (i) Laying on Table; and
- (ii) Scrutiny Committees.

(i) *Laying on Table*

(A) *Object*

In almost all the Commonwealth countries, the procedure of 'Laying on the Table' of the legislature is followed. It serves two purposes; *firstly*, it informs the legislature as to what rules have been made by the executive authorities in exercise of delegated legislative power; and *secondly*,

44. *Id.* p. 100.

45. *Treatise on Administrative Law*, 1996, Vol. 1, p. 136. See also Wade: *Administrative Law*, 1994, pp. 898-99; *Atlas Cycle Industries Ltd. v. State of Haryana*, (1979) 2 SCC 196 (203); AIR 1979 SC 1149.

46. *Lohia Machines Ltd. v. Union of India*, (1985) 2 SCC 197 (para 26); AIR 1985 SC 421.

it provides an opportunity to the legislators to question or challenge the rules already made or proposed to be made. Through this 'safety-valve' the legislature exercises supervision, check and control over executive rule-making power. 'Laying technique' brings legislature into close and constant contact with the administration.⁴⁷

(B) Types

There are several types of 'laying'. The extent of legislative control necessarily differs in these cases. The Select Committee on Delegated Legislation summarised the procedure under seven heads.⁴⁸

(1) *Laying without further provision for control.*—Here the parent Act merely provides that the rules shall be laid before Parliament. They become operative from the date they are laid before the Houses and in exceptional cases, even before they are so laid. This procedure is only to inform Parliament as to what rules were made by the executive authorities.

(2) *Laying with deferred operation.*—The requirement of laying is linked with postponement of operation of the rules and thus Parliament gets more control.

(3) *Laying with immediate effect but subject to annulment.*—Here the rules come into force when laid before Parliament, but cease to be in operation if disapproved by it within a specified period. As May⁴⁹ comments, 'this is the most common form of Parliamentary control' and is known as the 'negative resolution' procedure.

(4) *Laying in draft but subject to resolution that no further proceedings be taken.*—This is also a 'negative resolution' procedure. Here draft of statutory rules are required to be laid before Parliament but the parent Act provides that the rules should not be made effective until a particular period has expired.

(5) *Laying in draft and requiring affirmative resolution.*—This belongs to the realm of 'positive resolution' and provides a stringent parliamentary supervision over delegated legislation unlike the 'negative resolution' procedure. The draft rules do not become effective until an affirmative resolution approving the same has been passed by Parliament. An opportunity is provided to the members to discuss and

47. *N.K. Pappiah v. Excise Commr.*, (1975) 1 SCC 492: AIR 1975 SC 1007; *State of M.P. v. Mahalaxmi Fabric Mills*, 1995 Supp (1) SCC 692: AIR 1995 SC 2213.

48. *Delegated Legislation in India*, ILI, 1964, pp. 166-69.

49. *Parliamentary Practice*, 15th Edn., p. 287.

effect to the rules before they can finally be given effect to by the executive.

(6) *Laying with operation deferred until approval given by affirmative resolution.*—Here the rules are actually made but they do not come into operation until approved by Parliament. There is virtually no difference between this procedure and a 'positive resolution' procedure, discussed under head (5).

(7) *Laying with immediate effect but requiring affirmative resolution as a condition for continuance.*—This form of laying is used where prompt operation of delegated legislation is essential but strict parliamentary supervision is also necessary. The confirmatory resolution keeps the delegated legislation alive, which would otherwise die. It is often applied in cases of taxation or to rules made during Emergency.

In India, there is no statutory provision requiring 'laying' of all delegated legislation.⁵⁰ According to the Committee on Delegated Legislation, the statutes contain four methods of laying:

- (i) Requirement of mere publication of rules in the Official Gazette;
- (ii) Requirement of such publication and laying on the Table;
- (iii) Over and above the aforesaid two conditions, some statutes allowed modification by Parliament; and
- (iv) Requirement of laying of rules for a specified period before they are published in the Official Gazette.

C) Suggestions

As there was no uniform practice in the laying procedure, the Scrutiny Committee made the following suggestions:

- (i) All Acts of Parliament should uniformly require that the rules shall be laid on the Table of the House 'as soon as possible';

50. Generally, a provision of laying is found in a number of statutes, in the following words:

"Every rule made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two successive sessions and if before the expiry of the session both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or to be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

- (ii) This period should be uniform and should be a total period of thirty days from the date of their final publication; and
- (iii) The rules will be subject to such modification as the Houses may like to make.

(D) *Effect of laying*

When the Act merely requires laying of rules before Parliament, they come into force as soon as they are made. If the parent Act provides 'affirmative procedure', they will be effective from the date they are approved by the House. The 'laying procedure', however, does not confer on rules, status equal to the Act in absence of specific provision in the parent statute.⁵¹

(E) *Failure to lay*

In England, the position is not clear. In *Bailey v. Williamson*⁵², the condition of laying was held to be directory. However, the position has changed after passing of the Statutory Instruments Act, 1946, and in *R. v. Sheer Metal Craft*⁵³, the court held that delegated legislation became valid only after it was laid before Parliament.

In India also, the position is not categorical. In *Express Newspaper (P) Ltd. v. Union of India*⁵⁴, the Supreme Court observed by way of *obiter dicta* that the provision regarding laying was mandatory. But in *Kerala Education Bill, 1957, Re*⁵⁵, the Supreme Court most emphatically and lucidly observed:

"After the rules are laid before the Legislative Assembly, they may be altered or amended and it is then that the rules as amended become effective." (emphasis supplied)

But in *Jan Mohd. v. State of Gujarat*⁵⁶, the court held that the rules made under the parent Act were valid, and observed that though the rules were not laid before the legislature, they became valid from the date on which they were made as the Act did not provide that they could in case be invalidated by failure to place them before the legislature.

In *N.K. Pappiah v. Excise Commissioner*⁵⁷, the court held that the rules under the parent Act came into force as soon as they were framed. Negating the contention that the power of the legislature to annul or

51. *Bharat Hari v. CWT*, 1994 Supp (3) SCC 46; AIR 1994 SC 1355.

52. (1873) QB 118.

53. (1954) 1 All ER 542; (1954) 1 QB 586.

54. AIR 1958 SC 578; 1959 SCR 12.

55. AIR 1958 SC 956 (975); 1959 SCR 995.

56. AIR 1966 SC 385 (1012); (1966) 1 SCR 505.

57. (1975) 1 SCC 492 (498); AIR 1975 SC 1007 (1012).

repeal rules subsequently could not be regarded as a sufficient control over the delegated legislation, Mathew, J. observed:

“The dilution of parliamentary watch-dogging of delegated legislation may be deplored but, in the compulsions and complexities of modern life, cannot be helped.”

(F) *Conclusions*

What are the consequences of failure to lay? It is submitted that the correct answer to this question depends on the terms relating to a particular laying clause. If the provision relating to laying is a condition precedent, the requirement of laying must be held to be mandatory and the rules do not come into force until they are laid. In case of ‘negative clause’, however, the rules come into operation immediately and the provision of laying is generally construed as directory.

(ii) *Scrutiny Committees*

(A) *Object*

As discussed above, laying on the table has not always been held to be mandatory. Even if that requirement is complied with, mere laying of rules before Parliament would not be of much use, unless the rules were properly studied and scrutinized. And, therefore, with a view to strengthening Parliamentary control over delegated legislation, Scrutiny Committees are established. In England, the Select Committee on Statutory Instruments was established by the House of Commons in 1944. In India also, there are two Scrutiny Committees: (1) the Lok Sabha Committee on Subordinate Legislation; and (2) the Rajya Sabha Committee on Subordinate Legislation.

(B) *Functions*

The function of these Committees is ‘to scrutinise and report to the respective Houses whether the powers to make regulations, rules, sub-rules, bye-laws, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation’. “They act as watch-dogs which bark and arouse their master from slumber when they find that an invasion on the premises has taken place.”⁵⁸

(C) *Suggestions*

The Indian Committee on Subordinate Legislation has made *inter alia* the following recommendations and suggestions:

- (a) Power of judicial review should not be taken away or curtailed by rules.

58. *Delegated Legislation in India*, ILI, 1964, p. 201.

- (b) A financial levy or tax should not be imposed by rules.
- (c) Language of rules should be simple and clear and not complicated or ambiguous.
- (d) Rules should not be given retrospective operation, unless such a power has been expressly conferred by the parent Act, as they may prejudicially affect the vested rights of a person.
- (e) Legislative policy must be formulated by the legislature and laid down in the statute and the power to supply details may be left to the executive, and can be worked out through the rules made by the administration.
- (f) Sub-delegation in very wide language is improper and some safeguards must be provided before a delegate is allowed to sub-delegate his authority to another functionary.
- (g) Discriminatory rules should not be framed by administration.
- (h) Rules should not travel beyond the rule-making power conferred by the parent Act.
- (i) There should not be inordinate delay in making of rules by the administration.
- (j) The defects in rules pointed out to the administration should be cured as soon as possible.
- (k) The rules framed by the administration and required to be laid before the House by the parent Act should be laid before Parliament as soon as possible, and whenever there is inordinate delay, an explanatory note giving the reasons for such delay should be appended to the rules so laid.
- (l) The final authority of interpretation of rules should not be with the administration.
- (m) Rules should contain short titles, explanatory notes, reference to earlier amendments for convenience of location, ready reference and proper understanding.
- (n) Sufficient publicity must be given to the statutory rules and orders.

The working of the Committee is on the whole satisfactory and it has proved to be a fairly effective body in properly examining and effectively improving upon delegated legislation in India. Sir Cecil Carr⁵⁹ aptly remarks: "It is evidently a vigorous and independent body."

59. *Parliamentary Control of Delegated Legislation*, Public Law, 1956, p. 200 (215).

(d) Conclusions

Parliamentary control is, however, not effective. Wade⁶⁰ says: "One of the features of the twentieth century has been a shift of the constitutional centre of gravity, away from Parliament and towards the executive. Mr Lloyd George once said: 'Parliament has really no control over the Executive; it is a pure fiction'." The accusation against the House of Commons at the present time is that it allows government departments to do things, without knowing what is being done.⁶¹

Prof. Ramsay Muir states: "There is no country in North-Western Europe in which the control exercised by Parliament over the Government over legislation, taxation and administration — is more shadowy and unreal than it is in Britain. *Parliament is no longer, in any real sense, the sovereign power.*"⁶² (emphasis supplied)

4. OTHER CONTROLS

Over and above judicial and parliamentary controls, sometimes other controls and safeguards are also provided. One of such safeguards against the abuse of delegated power is to properly and precisely limit the power of the delegate. If the extent of power is not properly defined in the parent Act, the executive authority may usurp some powers of the legislature and may be tempted into unjustified interference with the rights of the individuals. The courts also should interpret the provisions of rules and regulations in such a manner as not to give blanket powers to the executive authority.

It is also argued that the delegation of power should be conferred only on trustworthy authorities, e.g. Central Government, State Governments, etc., as these authorities will exercise the power conferred on them in a reasonable manner. In *Maneka Gandhi v. Union of India*⁶³, the Supreme Court has observed:

"It is true that when the order impounding a passport is made by the Central Government, there is no appeal against it, but it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Government will exercise the power in a reasonable and responsible manner. *When power is vested in a high authority like the Central Government, abuse of power cannot be lightly assumed.*"⁶⁴ (emphasis supplied)

60. *Administrative Law*, 1994, p. 897.

61. Lord Hemingford cited by Jois: *Delegated Legislation*, 1982, p. 150.

62. Cited by Jois (*ibid.*), p. 146.

63. (1978) 1 SCC 248: AIR 1978 SC 597: (1978) 2 SCR 621.

64. *Id.* at p. 294 (SCC): 632 (AIR) (Per Bhagwati, J.), see also C.K. Thakker: *Administrative Law*, 1996, pp. 156-57.

In *S.R. Bommai v. Union of India*⁶⁵, dealing with the power of the President to proclaim Emergency, Jeevan Reddy, J. stated:

“It is necessary to reiterate that the court must be conscious while examining the validity of the Proclamation that it is a power vested in the highest constitutional functionary of the Nation. *The court will not lightly presume abuse or misuse.*” (emphasis supplied)

In collective exercise of power also, there is no likelihood of abuse of power. In *K. Ashok Reddy v. Govt. of India*⁶⁶, an action of transfer of a Judge of a High Court was challenged. The decision was based on collective exercise of power by high constitutional functionaries on objective criterion. Treating it as inbuilt safeguard on arbitrariness and bias, the Supreme Court observed: “*We have no doubt that the Chief Justice of India acting on the institutional advice available to him is the surest and the safest bet for preservation of the independence of judiciary.*” (emphasis supplied)

Certain Central Acts provide some additional safeguards also. They empower the State Governments to frame rules, but prior approval of the Central Government is necessary, e.g. Section 17 of the Probation of Offenders Act, 1958. Some statutes empower the Government to frame rules subject to previous publication in the Official Gazette, e.g. Section 29 of the Minimum Wages Act, 1948. Sometimes, powers are conferred on the Government to frame rules or regulations only after consultation with the affected interests, e.g. Section 59 of the Mines Act, 1952.

5. CONCLUSIONS

Plenary powers of law-making are entrusted to elected representatives. But in reality, the political Government, instructed by the bureaucracy, gets bills passed through either by the aid of whip or by other methods. Thus, law making has remained, more or less, exclusive prerogative of a small cross-section of elites. It affects not only the quality of the law made but reinforces centralised system of power. There must, therefore, be social auditing by public at large. Constitutional legitimisation of unlimited power of delegation to the executive by the Legislature may, on critical occasions, be subversive of responsible Government and erosive of democratic order.⁶⁷

The system of law-making, therefore, needs careful and radical restructuring, if participative, pluralist Government by the People is not to be jettisoned. As Krishna Iyer, J. stated: “That peril prompts us to hint

65. (1994) 3 SCC 1 (268).

66. (1994) 2 SCC 303 (314); AIR 1994 SC 1207 (1214) (Per Verma, J.).

67. *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137 (160); AIR 1979 SC 321 (336); see also observations of Prof. Upendra Baxi cited in that case.

at certain portents to our parliamentary system, not because they are likely now but because society may have to pay the price some day.⁶⁸

It is submitted that the following observations of Shah, J. (as he then was) in *Municipal Corpn. of Delhi v. Birla Cotton Mills*⁶⁹ are worth remembering:

“(T)he guidance which saves delegation from the vice of excessiveness may be express or may be implied: and the extent of the guidance must be determined by the subject-matter of legislation and the power entrusted. But in our judgment, the delegation cannot be upheld, merely because of the special status, character, competence or capacity of the delegate or by reference to the provisions made in the statute to prevent abuse by the delegate of its authority. The question is one of the restriction upon the power of the legislative body to delegate the power of legislation and that restriction is not removed because the delegate is a high dignitary of the State or is especially versed in a particular branch of administration or has special information or is in a position to collect that information, or is not likely to abuse its authority. The Constitution entrusts the legislative functions to the legislative branch of the State, and directs that the functions shall be performed by that body to which the Constitution has entrusted and not by some one else to whom the Legislature at a given time thinks it proper to delegate the function entrusted to it. A body of experts in a particular branch of undoubted integrity or special competence may probably be in a better position to exercise the power of legislation in that branch, but the Constitution has chosen to invest the elected representatives of the people to exercise the power of legislation, and not to such bodies of experts. Any attempt on the part of the experts to usurp, or of the representatives of the people to abdicate the functions vested in the legislative branch is inconsistent with the constitutional scheme. Power to make subordinate or ancillary legislation may undoubtedly be conferred upon a delegate, but the Legislature must in conferring that power disclose the policy, principles or standards which are to govern the delegate in the exercise of that power so as to set out a guidance. *Any delegation which transgresses this limit infringes the constitutional scheme.*”⁷⁰ (emphasis supplied)

68. *Avinder Singh v. State of Punjab*, *ibid.*

69. AIR 1968 SC 1232: (1968) 3 SCR 251.

70. *Id.* at p. 1262 (AIR). See also observations of US Supreme Court in *Industrial Deptt. v. American Petroleum Institution*, (1980), 448 US 607; “We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority.”

Lecture VI

Natural Justice

[I]t is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi-judicial decisions ought to conform. The principles on which they rest are, we think, implicit in the rule of law. Their observance is demanded by our notional sense of justice.

—THE COMMITTEE ON MINISTERS' POWERS

A monkey does not decide an affair of the forest.

—THE KIGANDA PROVERB

Doth our law judge any man before it hear him and know what he doeth.

—JOHN

SYNOPSIS

1. General
2. Definition
3. Historical growth
4. Natural justice and statutory provisions
5. Against whom natural justice can be enforced
6. Principles of natural justice
 - (1) Bias or interest
 - (a) General
 - (b) Meaning
 - (c) Principle explained
 - (d) Types of bias
 - (i) Pecuniary bias
 - (ii) Personal bias
 - (iii) Official bias
 - (e) Test: Real likelihood of bias
 - (2) Audi alteram partem
 - (a) Meaning
 - (b) Principle explained
 - (i) Notice
 - (ii) Hearing
 - (c) Oral or personal hearing
 - (d) Right of Counsel
 - (e) Right of 'friend'
 - (f) General principles
 - (3) Speaking orders
 - (a) Meaning
 - (b) Importance

- (c) Object
 - (d) Express provision whether necessary
 - (e) Where order is subject to appeal or revision
 - (f) Private law
 - (g) Recording of reasons whether part of natural justice
 - (h) Non-existence and non-communication of reasons
 - (i) General propositions
7. Pre-decisional and Post-decisional hearing
 - (a) General
 - (b) Hearing at appellate stage
 - (c) Conclusions
 8. Exclusion of natural justice
 - (a) General
 - (b) Circumstances
 - (c) Conclusions
 9. Effect of breach of natural justice: Void or voidable
 - (a) General
 - (b) England
 - (c) India
 - (d) Test
 - (e) Conclusions
 10. Where natural justice violated: Illustrative Cases
 11. Where natural justice not violated: Illustrative Cases

1. GENERAL

Natural justice is an important concept in administrative law. In the words of Megarry, J.¹ it is 'justice that is simple and elementary, as distinct from justice that is complex, sophisticated and technical'. The principles of natural justice or fundamental rules of procedure for administrative action are neither fixed nor prescribed in any code. They are better known than described and easier proclaimed than defined.² 'Natural justice' has meant many things to many writers, lawyers and systems of law. It has many colours and shades and many forms and shapes. According to de Smith³, the term 'natural justice' expresses the close relationship between the Common Law and moral principles and it has an impressive ancestry. It is also known as 'substantial justice', 'fundamental justice', 'universal justice' or 'fair play in action'. It is a great humanising principle intended to invest law with fairness, to secure justice and to prevent miscarriage of justice.

1. *John v. Rees*, (1969) 2 All ER 274; (1970) 1 Ch D 345.

2. *Abbot v. Sullivan*, (1952) 1 KB 189 (195); (1952) 1 All ER 226.

3. *Judicial Review of Administrative Action*, 1995, p. 378.

In *Wiseman v. Borneman*⁴, it is observed:

“[T]he conception of natural justice should at all stages guide those who discharge judicial functions is *not merely an acceptable but is an essential part of the philosophy of the law....*”⁵

(emphasis supplied)

2. DEFINITION

It is not possible to define precisely and scientifically the expression ‘natural justice’. Though highly attractive and potential, it is a vague and ambiguous concept and, having been criticised as ‘sadly lacking in precision’⁶, has been consigned more than once to the lumber-room.⁷ It is a confused and unwarranted concept and encroaches on the field of ethics⁸. ‘Though eminent Judges have at times used the phrase ‘the principles of natural justice’, even now the concept differs widely in countries usually described as civilised.

It is true that the concept of natural justice is not very clear and, therefore, it is not possible to define it; yet the principles of natural justice are accepted and enforced. In reply to the aforesaid criticism against natural justice, Lord Reid in the historical decision of *Ridge v. Baldwin*⁹ observed:

“In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist....”¹⁰

3. HISTORICAL GROWTH

According to de Smith¹¹, the term ‘natural justice’ expresses the close relationship between the Common Law and the moral principles and describes what is right and what is wrong. It has an impressive history. It has been recognised from the earliest times: it is not judge-made law. In days bygone the Greeks had accepted the principle that ‘no man should be condemned unheard’. The historical and philosophical foundations of the English concept of natural justice may be insecure, nevertheless they

4. (1971) AC 297: (1969) 3 All ER 275: (1969) 3 WLR 706.

5. *Id.* at p. 308 (AC).

6. *R. v. Local Govt. Board, ex p Arlidge*, (1914) 1 KB 160 (199).

7. de Smith: *Judicial Review of Administrative Action*, 1995, p. 377.

8. *Local Govt. Board v. Arlidge*, (1915) AC 120: (1914-15) 1 All ER.

9. (1964) AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935.

10. *Id.* at pp. 64-65 (AC): p. 74 (All ER).

11. *Judicial Review of Administrative Action*, 1995, pp. 377-79.

are worthy of preservation. Indeed, from the legendary days of Adam and of Kautilya's *Arthashastra*, the rule of law has had this stamp of natural justice which makes it social justice.¹²

4. NATURAL JUSTICE AND STATUTORY PROVISIONS

Generally, no provision is found in any statute for the observance of the principles of natural justice by the adjudicating authorities. The question then arises whether the adjudicating authority is bound to follow the principles of natural justice. The law is well-settled after the powerful pronouncement of Byles, J. in *Cooper v. Wandsworth Board of Works*¹³, wherein His Lordship observed:

"A long course of decisions, beginning with *Dr Bentley's case*¹⁴ and ending with some very recent cases, establish that although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."¹⁵ (emphasis supplied)

de Smith¹⁶ also says that where a statute authorising interference with property or civil rights was silent on the question of notice and hearing, the courts would apply the rule as it is "of universal application and founded on the plainest principles of natural justice". Wade¹⁷ states that the rules of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of the power. He adds, "the presumption is, it (natural justice) will always apply, however silent about it the statute may be".

The above principle is accepted in India also. In the famous case of *A.K. Kraipak v. Union of India*¹⁸, speaking for the Supreme Court, Hegde, J. propounded:

"The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other

12. *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405 (432): AIR 1978 SC 851 (870); see also *Union of India v. Tulsiram Patel*, (1985) 3 SCC 398 (467-68): AIR 1985 SC 1416 (1454-55). For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 161-63.

13. (1863) 14 CBNS 180.

14. *R. v. University of Cambridge*, (1723) 1 Str 557.

15. *Id.* at p. 194; see also *Judicial Review of Administrative Action*, 1995, pp. 382-83.

16. *Id.* at pp. 410-13.

17. *Administrative Law*, 1994, pp. 465, 491, 516.

18. (1969) 2 SCC 262: AIR 1970 SC 150.

words they do not supplant the law of the land but supplement it."¹⁹
(emphasis supplied)

In *Maneka Gandhi v. Union of India*²⁰, Beg, C.J. observed: "It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action."²¹

5. AGAINST WHOM NATURAL JUSTICE CAN BE ENFORCED

It is settled law and there is no dispute that the principles of natural justice are binding on all the courts, judicial bodies and quasi-judicial authorities. But the important questions are: Whether these principles are applicable to administrative authorities? Whether those bodies are also bound to observe them? Whether an administrative order passed in violation of these principles is *ultra vires* on that ground? Formerly, courts had taken the view that the principles of natural justice were inapplicable to administrative orders. In *Franklin v. Minister of Town and Country Planning*²², Lord Thankerton observed that as the duty imposed on the Minister was merely administrative and not judicial or quasi-judicial, the only question was, whether the Minister has complied with the direction or not. In the words of Chagla, C.J.²³ 'it would be erroneous to import into the consideration of an administrative order the principles of natural justice'. In *Kishan Chand v. Comnr. of Police*²⁴, speaking for the Supreme Court, Wanchoo, J. (as he then was) observed:

"The compulsion of hearing before passing the order implied in the maxim '*audi alteram partem*' applies only to judicial or quasi-judicial proceedings."

But as observed by Lord Denning²⁵, at one time it was said that the principles of natural justice applied only to judicial proceedings and not to administrative proceedings, but 'that heresy was scotched' in *Ridge*

19. *Id.* at p. 272 (SCC): 156 (AIR).

20. (1978) 1 SCC 248: AIR 1978 SC 597.

21. *Id.* at p. 402 (SCC): 611 (AIR). For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 163-65.

22. (1947) 2 All ER 289: (1948) AC 87.

23. *Bapurao v. State*, AIR 1956 Bom 300 (301): (1956) 58 Bom LR 418 (422).

24. AIR 1961 SC 705 (710): (1961) 3 SCR 135.

25. *R. v. Gaming Board*, (1970) 2 All ER 528: (1970) 2 QB 417: (1970) 2 WLR 1009.

v. *Baldwin*²⁶. Wade²⁷ states that the principles of natural justice are applicable to 'almost the whole range of administrative powers'. In *Breen v. Amalgamated Engineering Union*²⁸, Lord Denning observed: "It is now well-settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand." Lord Morris declares: "We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. *But I affirm that the area of administrative action is but one area in which the principles are to be deployed.*"²⁹ (emphasis supplied)

This principle is accepted in India also. In *State of Orissa v. Binapani*³⁰, speaking for the Supreme Court, Shah, J. (as he then was) observed: "It is true that the order is administrative in character, but even an administrative order which involves civil consequences ... must be made consistently with the rules of natural justice..."

In *A.K. Kraipak v. Union of India*³¹, the Court observed:

"Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. *If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries.*"

(emphasis supplied)

Again, in *Maneka Gandhi*³², Kailasam, J. pronounced: "The frontier between judicial or quasi-judicial determination on the one hand and an executive on the other has become blurred. The rigid view that principles

26. (1964) AC 40; (1963) 2 All ER 66; (1963) 2 WLR 935.

27. *Administrative Law*, 1994, pp. 463-64.

28. (1971) 1 All ER 1148 (1153); (1971) 2 QB 175; (1971) 2 WLR 742.

29. Quoted in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (285); AIR 1978 SC 597(623).

30. AIR 1967 SC 1269 (1272); (1967) 2 SCR 625.

31. (1969) 2 SCC 262 (272); AIR 1970 SC 150(157); see also *D.K. Yadav v. J.M.A. Industries Ltd.*, (1993) 3 SCC 259 (268-68).

32. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (385); AIR 1978 SC 597 (690); see also *Rattan Lal v. Managing Committee*, (1993) 4 SCC 10 (17-18); AIR 1993 SC 2155.

of natural justice applied only to judicial and quasi-judicial acts and not to administrative acts no longer holds the field."

Moreover, the principles of natural justice apply not only to the legislation or State action but also apply where any tribunal, authority or body of persons, not falling within the definition of "State" under Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such a matter fairly and impartially.³³

6. PRINCIPLES OF NATURAL JUSTICE

As stated above, 'natural justice' has meant many things to many writers, lawyers, jurists and systems of law. It has many colours, shades, shapes and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within the strait-jacket of a rigid formula. In *Russel v. Duke of Norfolk*³⁴, Tucker, L.J. observed: "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

In the oft-quoted passage from *Byrne v. Kinematograph Renters Society Ltd.*³⁵, Lord Harman enunciates:

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. *I do not think that there really is anything more.*"
(emphasis supplied)

The same view is taken in India. In *Union of India v. P.K. Roy*³⁶, speaking for the Supreme Court, Ramaswami, J. observed: "[T]he extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

33. *Delhi Transport Corpn. v. DTC Mazdoor Congress*, 1991 Supp (1) SCC 600 (752): AIR 1991 SC 101.

34. (1949) 1 All ER 109 (118): 65 TLR 225.

35. (1958) 2 All ER 579 (599): (1958) 1 WLR 762.

36. AIR 1968 SC 850 (858): (1968) 2 SCR 186.

In *A.K. Kraipak*³⁷ Hegde, J. rightly observed:

“What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. *Whenever a complaint is made before a court that some principle of natural justice had been contravened, the court had to decide whether the observance of that rule was necessary for a just decision on the facts of that case.*” (emphasis supplied)

English Law recognises two principles of natural justice:

- (a) *Nemo debet esse iudex in propria causa*: No man shall be a judge in his own cause, or the deciding authority must be impartial and without bias; and
- (b) *Audi alteram partem*: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority.

(1) Bias or interest

(a) General

The first principle of natural justice consists of the rule against bias or interest and is based on three maxims: (i) “No man shall be a judge in his own cause”;³⁸ (ii) “Justice should not only be done, but manifestly and undoubtedly be seen to be done”;³⁹ and (iii) “Judges, like Caesar’s wife should be above suspicion”.⁴⁰

(b) Meaning

According to the dictionary meaning ‘anything which tends or may be regarded as tending to cause such a person to decide a case *otherwise than on evidence* must be held to be biased’.⁴¹ “A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias”.⁴²

37. *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262 (272): AIR 1970 SC 150 (157); see also *Rattan Lal v. Managing Committee* (*supra*), at pp. 18-19 (SCC).

38. Lord Coke in *Egerton v. Lord Derby*, (1613) 12 Co. Rep 11; Viscount Care, L.C. in *Frome United Breweries v. Bath Justices*, (1926) AC 586 (592): (1926) All ER 576.

39. Lord Hewart in *R. v. Sussex Justices*, (1924) 1 KB 256 (259): (1923) All ER 233.

40. Justice Bowen in *Lesson v. General Council*, (1889) 43 Ch D 366 (385): (1886-90) All ER 78.

41. *Concise Oxford Dictionary*, (1995), p. 123, see also *Secretary to Govt., Transport Deptt. v. Munnuswamy*, 1988 Supp SCC 651: AIR 1988 SC 2232 (per Mukharji, J.).

42. *Secy. to Govt., Transport Deptt. v. Munnuswamy*, *Id.* at p. 654 (SCC).

In *Franklin v. Minister of Town & Country Planning*⁴³, Lord Thankerton defines bias as under:

“My Lords, I could wish that the use of the word ‘bias’ should be confined to its proper sphere. Its proper significance in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator.”

(c) Principle explained

The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter *objectively*. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undeflected. He should not allow his personal prejudice to go into the decision-making. “*The object is not merely that the scales be held even; it is also that they may not appear to be inclined.*”⁴⁴

(emphasis supplied)

He must think dispassionately and submerge private feeling on every aspect of a case. “*There is a good deal of shallow talk that the judicial robe does not change the man within it. It does.*”⁴⁵

(emphasis supplied)

If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially.

(d) Types of bias

Bias is of three types:

- (i) Pecuniary bias,
- (ii) Personal bias, and
- (iii) Official bias or bias as to subject-matter.

43. (1947) 2 All ER 289 (296): (1948) AC 87.

44. *R. v. Bath Compensation Authority*, (1925) 1 KB 635 (719) (Per Scrutton, J.).

45. *Public Utilities Comm. v. Franklin*, 343 US 451 (465-66): 692 Ed 1068 (1077) (Per Frankfurter, J.).

(i) *Pecuniary bias*

It is well-settled that as regards pecuniary interest "the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a Judge". Griffith and Street⁴⁶ rightly state that "a pecuniary interest, however slight, will disqualify, *even though it is not proved that the decision is in any way affected*".

(emphasis supplied)

In *Dr Bonham*⁴⁷, Dr Bonham, a doctor of Cambridge University was fined by the College of Physicians for practising in the city of London without the licence of the College. The statute under which the College acted provided that the fines should go half to the King and half to the College. The claim was disallowed by Coke, C.J. as the College had a financial interest in its own judgment and was a judge in its own cause.

*Dimes v. Grant Junction Canal*⁴⁸ is considered to be the classic example of the application of the rule against pecuniary interest. In this case, the suits were decreed by the Vice-Chancellor and the appeals against those decrees were filed in the Court of Lord Chancellor Cottenham. The appeals were dismissed by him and decrees were confirmed in favour of a canal company in which he was a substantial shareholder. The House of Lords agreed with the Vice-Chancellor and affirmed the decrees on merits. In fact, Lord Cottenham's decision was not in any way affected by his interest as a shareholder; and yet the House of Lords quashed the decision of Lord Cottenham. Lord Campbell observed:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but my Lords, it is of the last importance that the maxim, that no one is to be a judge in his own cause, should be held sacred.... And it will have a most salutary influence on (inferior) tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. *This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.*"⁴⁹

(emphasis supplied)

46. *Principles of Administrative Law*, 4th Edn., p. 156; see also *Halsbury's Laws of England*, 4th Edn., Vol. I, para 68, pp. 82-83.

47. (1610) 8 Co. Rep. 113 b: 77 ER 646.

48. (1852) 3 HL 759: 17 Jur 73.

49. *Id.* at p. 793 (HL).

The principle to be deduced from the above weighty pronouncement is that even the least pecuniary interest in the cause disqualifies a Judge. This principle should be observed to clear away everything which might engender suspicion and distrust of the tribunal and to promote the feeling of confidence in the administration of justice. As Lord Hewart stated: "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."⁵⁰

The same principle is accepted in India. In *Manak Lal v. Dr Prem Chand*⁵¹, speaking for the Supreme Court, Gajendragadkar, J. (as he then was) remarked:

"It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge."

In *Jeejeebhoy v. Asstt. Collector of Thana*⁵², Chief Justice Gajendragadkar reconstituted the Bench on objection being taken on behalf of the interveners in Court on the ground that the Chief Justice, who was a member of the Bench was also a member of the cooperative society for which the disputed land had been acquired.

In *Visakapatnam Coop. Motor Transport Co. Ltd. v. G. Bangaruraju*⁵³, a cooperative society had asked for a permit. The Collector was the President of that society and he was also a Chairman of the Regional Transport Authority who had granted the permit in favour of the society. The Court set aside the decision as being against the principles of natural justice.

In *Mohapatra & Co. v. State of Orissa*⁵⁴, some of the members of the Committee set up for selecting books for educational institutions were themselves authors whose books were to be considered for selection. It was held by the Supreme Court that the possibility of bias could not be ruled out. Madon, J. observed: "It is not the actual bias in favour of the author-member that is material, but the possibility of such bias."

(ii) *Personal bias*

The second type of bias is a personal one. A number of circumstances may give rise to personal bias. Here a Judge may be a relative, friend or business associate of a party. He may have some personal grudge, enmity or grievance or professional rivalry against such party. In view

50. *R. v. Sussex Justices*, (1924) 1 KB 256 (259): (1923) All ER 233.

51. AIR 1957 SC 425 (429): 1957 SCR 575 (581).

52. AIR 1965 SC 1096: (1965) 1 SCR 636.

53. AIR 1953 Mad 709.

54. (1984) 4 SCC 103 (112): AIR 1984 SC 1572 (1576).

of these factors, there is every likelihood that the Judge may be biased towards one party or prejudiced towards the other.⁵⁵

Thus, where the Chairman of the Bench was a friend of the wife's family, who had instituted matrimonial proceedings against her husband and the wife had told the husband that the Chairman would decide the case in her favour, the Divisional Court quashed the order.⁵⁶ Similarly, a Magistrate who was beaten by the accused was held disqualified from hearing a case filed against that accused.⁵⁷ Again, a decision was set aside on the ground that the Chairman was the husband of an executive officer of a body which was a party before the tribunal.⁵⁸ Likewise, a Magistrate cannot convict his own employees for breach of contract on the basis of a complaint filed by his bailiff.⁵⁹

The above principle is accepted in India also. In one case, a manager conducted an inquiry against a workman for the allegation that he had beaten the manager. It was held that the inquiry was vitiated.⁶⁰ In another case, there existed political rivalry between *M* and the Minister, who had cancelled the licence of *M*. A criminal case was also filed by the Minister against *M*. It was held that there was personal bias against *M* and the Minister was disqualified from taking any action against *M*.⁶¹

In *State of U.P. v. Mohd. Nooh*⁶², a departmental inquiry was held against *A* by *B*. As one of the witnesses against *A* turned hostile, *B* left the inquiry, gave evidence against *A*, resumed to complete the inquiry and passed an order of dismissal. The Supreme Court held that "the rules of natural justice were completely discarded and all canons of fair play were grievously violated" by *B*. Similarly, in *Rattan Lal v. Managing Committee*⁶³, *X* was a witness as well as one of the three members of an inquiry committee against *A*. At the inquiry, *A* was found guilty and was dismissed. Setting aside dismissal and following *Mohd. Nooh*, the Supreme Court held that the proceedings were vitiated because of prejudice of one of the members of the committee.

55. Griffith and Street: *Principles of Administrative Law*, 4th Edn., p. 156; de Smith: *Judicial Review of Administrative Action*, 1995, p. 522.

56. *Cottle v. Cottle*, (1939) 2 All ER 535: 83 SJ 501.

57. *R. v. Handley*, (1921) 61 DLR 585.

58. *Ladies of the Sacred Heart of Jesus v. Armstrong*, (1961) 29 DLR 373.

59. *R. v. Hoscason*, (1811) 14 East 605.

60. *Meenglass Tea Estate v. Workmen*, AIR 1963 SC 1719: (1964) 2 SCR 165.

61. *Mineral Development Corpn. Ltd. v. State of Bihar*, AIR 1960 SC 468: (1960) 2 SCR 609.

62. AIR 1958 SC 86: 1958 SCR 595.

63. (1993) 4 SCC 10: AIR 1993 SC 2155.

In the leading case of *A.K. Kraipak v. Union of India*⁶⁴, one *N* was a candidate for selection to the Indian Foreign Service and was also a member of the Selection Board. *N* did not sit on the Board when his own name was considered. Name of *N* was recommended by the Board and he was selected by the Public Service Commission. The candidates who were not selected filed a writ petition for quashing the selection of *N* on the ground that the principles of natural justice were violated. Quashing the selection, the Court observed: "It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. *The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased.*"⁶⁵ (emphasis supplied)

(iii) *Official bias*

The third type of bias is official bias or bias as to the subject-matter. This may arise when the Judge has a general interest in the subject-matter. According to Griffith and Street⁶⁶, "only rarely will this bias invalidate proceedings". A mere general interest in the general object to be pursued would not disqualify a Judge from deciding the matter. There must be some direct connection with the litigation. Wade⁶⁷ remarks that ministerial or departmental policy cannot be regarded as a disqualifying bias. Suppose a Minister is empowered to frame a scheme after hearing the objections. The procedure for hearing the objections is subject to the principles of natural justice insofar as they require a fair hearing. But the Minister's decision cannot be impugned on the ground that he has advocated the scheme or he is known to support it as a matter of policy.

64. (1969) 2 SCC 262: AIR 1970 SC 150.

65. *Id.* p. 155 (AIR).

66. *Administrative Law*, 4th Edn., p. 156.

67. *Administrative Law*, 1994, pp. 488-91.

In fact, the object of giving power to the Minister is to implement the policy of the Government.

The above principle has been accepted in India also. As discussed above, mere 'official' or 'policy' may not necessarily be held to disqualify an official from acting as an adjudicator unless there is total non-application of mind on his part or he has acted as per dictation of the superior authority instead of deciding the matter independently or has pre-judged the issue or has taken improper attitude to uphold the policy of the department, so as to constitute a *legal* bias.

Thus, in *Gullapalli Nageswara Rao v. A.P.S.R.T.C. (Gullapalli I)*⁶⁸, the petitioners were carrying on motor transport business. The Andhra State Transport Undertaking published a scheme for nationalisation of motor transport in the State and invited objections. The objections filed by the petitioners were received and heard by the Secretary and thereafter the scheme was approved by the Chief Minister. The Supreme Court upheld the contention of the petitioners that the official who heard the objections was 'in substance' one of the parties to the dispute and hence the principles of natural justice were violated.

But in *Gullapalli II*⁶⁹, the Supreme Court qualified the application of the doctrine of official bias. Here the hearing was given by the Minister and not by the Secretary. The Court held that the proceedings were not vitiated as 'the Secretary was a part of the department but the Minister was only primarily responsible for the disposal of the business pertaining to that department'.

In *Krishna Bus Service (P) Ltd. v. State of Haryana*⁷⁰, the legality and validity of the notification issued by the State Government conferring the powers of Deputy Superintendent of Police on the General Manager, Haryana Roadways was challenged by private operators of motor vehicles *inter alia* on the ground of interest and bias. Upholding the contention and quashing the notification, the Supreme Court observed: "The General Manager of Haryana Roadways who is a rival in business of the private operators of motor vehicles in the State and is intimately connected with the running of motor vehicles cannot be expected to discharge his duties in a fair and reasonable manner. An unobstructed operation of the motor vehicles by private owners operating along the same route or routes would naturally affect the earnings of the Haryana Road-

68. AIR 1959 SC 308; 1959 Supp (1) SCR 319.

69. *Gullapalli Nageswararao v. State of A.P.*, AIR 1959 SC 1376; (1960) 1 SCR 580.

70. (1985) 3 SCC 711; AIR 1985 SC 1651.

ways. There is, therefore, every likelihood of his being overzealous in discharging his duties of stopping a vehicle and in searching, seizing and detaining motor vehicles belonging to others and at the same time excessively lenient in the case of vehicles belonging to his own department. If in discharging his duties in the case of vehicles belonging to others he fails to give due regard to the interests of the owners thereof he would be violating their fundamental right to carry on business in a reasonable way. If he is too lenient in inspecting the vehicles belonging to his own department, the interests of the travelling public at large would be in peril. In both the cases there is a conflict between his duty on the one hand and his interest on the other. Moreover, *administration must be rooted in confidence and that confidence is destroyed when people begin to think that the officer concerned is biased.*"⁷¹

(emphasis supplied)

In *Institute of Chartered Accountants v. L.K. Rama*⁷², a member of the institute was removed on the ground of misconduct. The question before the Supreme Court was whether the finding of the Council holding the member guilty can be said to be vitiated on account of bias because the Chairman and the Vice-Chairman of the Disciplinary Committee were *ex officio* President and Vice-President of the Council, and other members of the Committee were also drawn from the Council. Holding that the decision was vitiated, the Court said: "We do not doubt that the President and the Vice-President and also the three other members of the Disciplinary Committee, should find it possible to act objectively during the decision-making process of the Council. *But to the member accused of misconduct, the danger of partisan consideration being accorded to the report would seem very real indeed.*"⁷³

(emphasis supplied)

(e) *Test: Real likelihood of bias*

As discussed above, a pecuniary interest, however small it may be, disqualifies a person from acting as a Judge. But that is not the position in case of personal bias or bias as to subject-matter. Here the test is whether there is a *real likelihood of bias* in the Judge.

de Smith⁷⁴ says, a 'real likelihood' of bias means at least substantial possibility of bias. Vaughan Williams, L.J.⁷⁵ rightly says that the court

71. *Id.* at p. 716 (SCC): 1654 (AIR) (per Venkataramiah, J.). See also *Observations of Lord Denning* at p. 164 (*infra*).

72. (1986) 4 SCC 537; AIR 1987 SC 71.

73. *Id.* at pp. 555-56 (SCC): 79-80 (AIR).

74. *Judicial Review of Administrative Action*, 1995, pp. 525-27.

75. *R. v. Sunderland*, (1901) 2 KB 357 (373); 65 JP 598.

will have to judge the matter 'as a reasonable man would judge of any matter in the conduct of his own business'. In the words of Lord Hewart, C.J.⁷⁶ the answer to the question whether there was a real likelihood of bias 'depends not upon what actually was done but upon what might appear to be done. *Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.*' (emphasis supplied) As Lord Denning⁷⁷ says: "The reason is plain enough. Justice must be rooted in confidence: and *confidence is destroyed when right-minded people go away thinking 'the judge was biased'.*" (emphasis supplied)

The same principle is accepted in India. In *Manak Lal v. Dr Prem Chand*⁷⁸, a complaint was filed by A against B, an advocate for an alleged act of misconduct. A disciplinary committee was appointed to make an inquiry into the allegations made against B. The Chairman had earlier represented A in a case. The Supreme Court held that the inquiry was vitiated even if it were assumed that the Chairman had no personal contact with his client and did not remember that he had appeared on his behalf at any time in the past. The Court laid down the test in the following words:

"In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal."⁷⁹

As to the test of likelihood of bias what is relevant is reasonableness of the apprehension in that regard in the mind of the party. The correct approach for the Judge is not to look at his own mind and ask himself, however honestly: "Am I biased?" but to look at the mind of the party before him.⁸⁰

76. *R. v. Sussex Justices*, (1924) 1 KB 256 (259); (1923) All ER 233.

77. *Metropolitan Properties Ltd. v. Lannon*, (1969) 1 QB 577 (578); (1968) 3 All ER 304; (1968) 3 WLR 394; see also *Krishna Bus Service (P) Ltd. v. State of Haryana*, (1985) 3 SCC 711; AIR 1985 SC 1651.

78. AIR 1957 SC 425; 1957 SCR 575.

79. *Id.* at p. 429 (AIR); see also *Gullapalli I*, AIR 1959 SC 308; *Gullapalli II*, AIR 1959 SC 1376; (1960) 1 SCR 580; *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262; AIR 1970 SC 150; *G. Sarana v. University of Lucknow*, (1976) 3 SCC 575; AIR 1976 SC 2428; *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611; AIR 1987 SC 2386; *International Airports Authority v. K.D. Bali*, (1988) 2 SCC 360; AIR 1988 SC 1099; *Hindustan Petroleum Corpn. v. Yashwant*, 1991 Supp (2) SCC 592; AIR 1991 SC 933.

80. *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611 (618-19); AIR 1987 SC 2386.

But at the same time, it should not be forgotten that the test of a real likelihood of bias must be based on the reasonable apprehensions of a reasonable man fully apprised of the facts. It is no doubt desirable that all Judges, like Caesar's wife must be above suspicion, but it would be hopeless for the courts to insist that only 'people who cannot be suspected of improper motives' were qualified at common law to discharge judicial functions, or to quash decisions on the strength of the suspicions of fools or other capricious and unreasonable people. The following observations of Frank, J. in *Linahan, Re*⁸¹ are worth quoting:

"If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices."⁸²

Reasonable apprehension in the mind of a reasonable man is necessary. Such reasonable apprehension must be based on cogent materials.⁸³ Moreover, normally a court will not uphold an allegation of bias against a person holding high constitutional status, such as, Election Commissioner.⁸⁴ Again, there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct.⁸⁵

81. (1943) 138 F 2nd 650.

82. *Id.* at p. 652; see also the following observations:

"I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas ! we are 'all the common growth of the Mother Earth' — even those of us who wear the long robe."

—JUSTICE JOHN CLARKE

"Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is."

—THOMAS REED POWELL

83. *Secy. to Govt., Transport Deptt. v. Munuswamy*, 1988 Supp SCC 651 (654): AIR 1988 SC 2232 (2234) (Per Mukharji, J.).

84. *Election Commission of India v. Subramaniam Swamy*, (1996) 4 SCC 104: AIR 1996 SC 1810.

85. *International Airports Authority v. K.D. Bali*, (1988) 2 SCC 360 (370-71): AIR 1988 SC 1099 (1105) (Per Mukharji, J.).

As Slade⁸⁶, J. states, "... it is necessary to remember Lord Hewart's principle that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done without giving currency to 'the erroneous impression that *it is more important that justice should appear to be done than that it should in fact be done*'. "⁸⁷ (emphasis supplied)

(2) Audi alteram partem

(a) Meaning

Audi alteram partem means 'hear the other side', or 'no man should be condemned unheard' or 'both the sides must be heard before passing any order'.

(b) Principle explained

The second fundamental principle of natural justice is *audi alteram partem*, i.e. no man should be condemned unheard, or both the sides must be heard before passing any order. de Smith⁸⁸ says, "no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him". "A party is not to suffer in person or in purse without an opportunity of being heard."⁸⁹ This is the first principle of civilised jurisprudence and is accepted by laws of Men and God. In short, before an order is passed against any person, reasonable opportunity of being heard must be given to him. Generally, this maximum includes two elements: (i) notice; and (ii) hearing.

(i) Notice

Before any action is taken, the affected party must be given a notice to show cause against the proposed action and seek his explanation. It is a *sine qua non* of the right of fair hearing. Any order passed without giving notice is against the principles of natural justice and is void *ab initio*.

In *Bagg case*⁹⁰, James Bagg, a Chief Burgess of Plymouth had been disfranchised for unbecoming conduct inasmuch as it was alleged that he had told the Mayor, 'You are a cozening knave. I will make thy neck

86. *R. v. Camborne Justices*, (1955) 1 QB 41; (1954) 2 All ER 850; (1954) 3 WLR 415.

87. *Id.* at p. 52 (QB); 855 (All ER).

88. *Judicial Review of Administrative Action*, 1995, p. 380.

89. *Painter v. Liverpool Oil Gas Light Co.*, (1836) A&E 433 (448-49).

90. (1615) 11 Co. Rep 93 b; 8 Digest 218.

crack' and by 'turning the hinder part of his body in an inhuman and uncivil manner' towards the Mayor, said, 'Come and kiss'. He was re-instated by mandamus as no notice or hearing was given to him before passing the impugned order.

In *R. v. University of Cambridge*⁹¹, Dr Bentley was deprived of his degrees by the Cambridge University on account of his alleged misconduct without giving any notice or opportunity of hearing. The Court of King's Bench declared the decision as null and void. According to Fortescue, J., the first hearing in human history was given in the Garden of Eden. His Lordship observed:

"[E]ven God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam,' says God, 'Where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' "

Even if there is no provision in the statute about giving of notice, if the order in question adversely affects the rights of an individual, the notice must be given. The notice must be clear, specific and unambiguous and the charges should not be vague and uncertain.⁹² The object of a notice is to give an opportunity to the individual concerned to present his case and, therefore, if the party is aware of the charges or allegations, a formal defect would not invalidate the notice, unless prejudice is caused to the individual.⁹³ If the government servant is placed under suspension and the inquiry is held at a different place from the place of his residence and he is not able to attend the inquiry due to non-payment of subsistence allowance, the inquiry is vitiated.⁹⁴ Whether prejudice is caused or not is a question of fact and it depends upon the facts and circumstances of the case. Moreover, the notice must give a reasonable opportunity to comply with the requirements mentioned therein. Thus, to give 24 hours' time to dismantle a structure alleged to be in a dilapidated condition is not proper and the notice is not valid.⁹⁵ If the inquiry is under Article 311 of the Constitution of India, two notices (first for charges or allegations and

91. (1723) 1 Str 757; 93 ER 698.

92. *N.R. Coop. Society v. Industrial Tribunal*, AIR 1967 SC 1182; (1967) 2 SCR 476; *B.D. Gupta v. State of Haryana*, (1973) 3 SCC 149; AIR 1972 SC 2472; *Sawai Sangh v. State of Rajasthan*, (1986) 3 SCC 454; AIR 1986 SC 995; *Board of Technical Education v. Dhanwantri*, AIR 1991 SC 271.

93. *Bhagwan Datta v. Ram Ratanji*, AIR 1960 SC 200; *Fazal Bhai v. Custodian General*, AIR 1961 SC 1397; (1962) 1 SCR 456.

94. *Ghanshyam Das v. State of M.P.*, (1973) 1 SCC 656; AIR 1973 SC 1183; *Mohal v. Senior Supdt. of Post Office*, 1991 Supp (2) SCC 503; AIR 1991 SC 328.

95. *State of J&K v. Haji Vali Mohd.*, (1972) 2 SCC 402; AIR 1972 SC 2538.

second for proposed punishment) should be given.¹ Where a notice regarding one charge has been given, the person cannot be punished for a different charge for which no notice or opportunity of being heard was given to him.²

(ii) *Hearing*

The second requirement of *audi alteram partem* maxim is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him.

In *Cooper v. Wandsworth Board of Works*³, the defendant Board had power to demolish any building without giving any opportunity of hearing if it was erected without prior permission. The Board demolished the house of the plaintiff under this provision. The action of the Board was not in violation of the statutory provision. The court held that the Board's power was subject to the qualification that no man can be deprived of his property without having an opportunity of being heard.

The historic case of *Ridge v. Baldwin*⁴ has rightly been described as the '*magna carta*' of natural justice.⁵ In that case, the plaintiff, a chief constable had been prosecuted but acquitted on certain charges of conspiracy. In the course of the judgment, certain observations were made by the presiding Judge against the plaintiff's character as a senior police officer. Taking into account those observations, the Watch Committee dismissed the plaintiff from service.

The Court of Appeal held that the Watch Committee was acting as an administrative authority and was not exercising judicial or *quasi-judicial* power, and therefore, the principles of natural justice did not apply to their proceedings for dismissal. Reversing the decision of the Court of Appeal, the House of Lords by a majority of 4:1 held that the power of dismissal could not be exercised without giving a reasonable opportunity of being heard and without observing the principles of natural justice. The order of dismissal was, therefore, held to be illegal.

1. It may be noted here that by the Constitution (42nd Amendment) Act, 1976, the provision regarding second notice has been deleted. See also *Union of India v. Tulsiram Patel*, (1985) 3 SCC 398; AIR 1985 SC 1416.

2. *Annamunthodo v. Oilfield Workers*, (1961) 3 All ER 621; (1961) 3 WLR 650; (1961) AC 945; *Gupta v. Union of India*, 1989 Supp (1) SCC 416; AIR 1989 SC 1393.

3. (1863) 14 CB (NS) 180; (1861-73) All ER 1554. For similar Indian case, see *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545; AIR 1986 SC 180.

4. (1964) AC 40; (1963) 2 All ER 66; (1963) 2 WLR 935 (HL).

5. C.K. Allen: *Law and Orders*, 1965, p. 242.

In *State of Orissa v. Binapani Dei*⁶, the petitioner was compulsorily retired from service on the ground that she had completed the age of 55 years. No opportunity of hearing was given to her before the impugned order was passed. The Supreme Court set aside the order as it was violative of the principles of natural justice.

Again, in *Maneka Gandhi v. Union of India*⁷, the passport of the petitioner-journalist was impounded by the Government of India 'in public interest'. No opportunity was given to the petitioner before taking the impugned action. The Supreme Court held that the order was violative of the principles of natural justice.

In *Olga Tellis*⁸, in spite of the statutory provision about removal of unauthorised construction by the Commissioner without notice, the Court held that it was merely an enabling provision and not a command not to issue notice before demolition of structure. The discretion was, therefore, required to be exercised in consonance with the principles of natural justice.

In *Nally Bharat Engineering Co. v. State of Bihar*⁹, a senior supervisor was dismissed from service by the Company for committing theft. The dispute was referred to the Labour Court, Dhanbad, under the Industrial Disputes Act, 1947. The workman made an application to the Labour Court stating that since he was residing at Haripur, it would be convenient for him if the case would be transferred to Labour Court, Patna. That application was made without intimation to the management. The Government also without issuing notice or affording opportunity to the management acceded to the request of the workman and transferred the case to Labour Court, Patna. The petition filed by the management against the said order was summarily dismissed by the High Court of Patna on the ground that no prejudice was caused to the Company. The management approached the Supreme Court.

Allowing the appeal and setting aside the order of the High Court as well as of the Government, the Supreme Court held that fairness required that an opportunity of hearing ought to have been afforded to the Company before passing the impugned order. Regarding prejudice, Shetty, J. rightly observed:

6. AIR 1967 SC 1269; (1967) 2 SCR 625.

7. (1978) 1 SCC 248; AIR 1978 SC 597.

8. *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545; AIR 1986 SC 180. See also *Aarti Gupta v. State of Punjab*, (1988) 1 SCC 258; AIR 1988 SC 481; *Ahmedabad Municipal Corpn. v. Nawab Khan*, AIR 1997 SC 152.

9. (1990) 2 SCC 48; (1990) 2 LLJ 211.

"The management need not establish prejudice for want of such opportunity.... [T]he principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. *The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.*"¹⁰

(emphasis supplied)

But, in *Maharashtra State Board of Secondary & H. S. Education v. Paritosh*¹¹, the Supreme Court held that the principles of natural justice cannot be carried to such lengths as to make it necessary that the candidates who have appeared in an examination should be allowed to participate in the process of evaluation of their performance or to verify the correctness of the evaluation made by the examiners by conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners. The test of reasonableness is not applied in vacuum but in the context of life's realities. As Mathew, J. states: "It is not expedient to extend the horizon of natural justice involved in the *audi alteram partem* rule to the twilight zone of mere expectations, however great they may be."¹²

Similarly, in *Hira Nath Mishra v. Principal, Rajendra Medical College*¹³, even though the statements of girl students were recorded behind the back of the boy students and no opportunity was afforded to the boy students to cross-examine the girl students, the order of expulsion from college passed against the boy students was upheld by the Supreme Court.

Again, the extent of opportunity of hearing to be given is not dependent upon the quantum of loss to the aggrieved person nor referable to the fatness of the stake but is essentially related to the demands of a given situation. Therefore, if a show cause notice is issued and the explanation is considered before taking action under the statutory provisions, the rules of natural justice cannot be said to have been violated on the ground that *more* opportunity should have been afforded as a huge amount was at stake¹⁴.

10. *Id.* at p. 57 (SCC).

11. (1984) 4 SCC 27; AIR 1984 SC 1543; (1985) 1 SCR 29; see also *Fatehchand Himmatlal v. State of Maharashtra*, (1977) 2 SCC 670; AIR 1977 SC 1825.

12. *Union of India v. M.L. Kapoor*, (1973) 2 SCC 836; AIR 1974 SC 87.

13. (1973) 1 SCC 805; AIR 1973 SC 1260.

14. *Jain Exports v. Union of India*, (1988) 3 SCC 579 (586).

(c) *Oral or personal hearing*

As discussed above, an adjudicating authority must observe the principles of natural justice and must give a reasonable opportunity of being heard to the person against whom the action is sought to be taken. But in England¹⁵ and in America¹⁶, it is well-settled law that in absence of statutory provisions, an administrative authority is not bound to give the person concerned an *oral* hearing. In India also, the same principle is accepted and oral hearing is not regarded as a *sine qua non* of natural justice. A person is not entitled to an oral hearing, unless such a right is conferred by the statute¹⁷. In *M.P. Industries v. Union of India*¹⁸, Subba Rao, J. (as he then was) observed:

“It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him (but) [t]he said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal.”¹⁹ (emphasis supplied)

Thus, it is well-established that principles of natural justice do not require personal hearing and if all the relevant circumstances have been taken into account before taking the impugned action, the said action cannot be set aside *only* on the ground that personal hearing was not given.²⁰

15. *Local Govt. Board v. Arlidge*, (1915) AC 120; (1914-15) All ER 1; *Ridge v. Baldwin*, (1964) AC 40; (1963) 2 All ER 66; (1963) 2 WLR 935; de Smith: *Judicial Review of Administrative Action*, 1995, pp. 437-41; Wade: *Administrative Law*, 1994, pp. 537-41.

16. *F.C.C. v. W.J.R.*, (1949) 337 US 265; see also observations of Hooper, C.J. ('The one who decides must hear'), in *Morgan (I) v. U.S.*, (1936) 298 US 468 (481); *Morgan (II)*, (1938) 304 US 23; *Morgan (IV)*, (1939) 307 US 183.

17. *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 (43); 1950 SCR 88; *F.N. Roy v. Collector of Customs*, AIR 1957 SC 648; 1957 SCR 1151; *Union of India v. J.P. Mitter*, (1971) 1 SCC 396; AIR 1971 SC 1093; *State of Assam v. Gauhati Municipal Board*, AIR 1967 SC 1398; *Farid Ahmed v. Ahmedabad Municipal Council*, (1976) 3 SCC 719; AIR 1976 SC 2095.

18. AIR 1966 SC 671; (1966) 1 SCR 466.

19. *Id.* at p. 675 (AIR); see also *Union of India v. Jyoti Prakash Mitter*, (1971) 1 SCC 396; AIR 1971 SC 1093.

20. *State of Maharashtra v. Lok Shikshan Sansthan*, (1971) 2 SCC 410 (420); AIR 1973 SC 588 (596); *Union of India v. Prabhavalkar*, (1973) 4 SCC 183 (193); AIR 1973 SC 2102 (2109); *State of Assam v. Gauhati Municipal Council*, AIR 1967 SC 1398; *Mohd. Ilyas v. Union of India*, (1970) 3 SCC 61; *Harish Uppal v. Union of India*, (1973) 3 SCC 319; AIR 1973 SC 258; *Carborandum Universal*

As already discussed, the principles of natural justice are flexible and whether they were observed in a given case or not depends upon the facts and circumstances of each case. The test is that the adjudicating authority must be impartial, 'fair hearing' must be given to the person concerned, and that he should not be 'hit below the belt'.²¹

But at the same time, it must be remembered that a 'hearing' will normally be an oral hearing.²² As a general rule, 'an opportunity to present contentions orally, with whatever advantages the method of presentation has, is one of the rudiments of the fair play required when the property is being taken or destroyed.'²³ de Smith²⁴ also says that 'in the absence of clear statutory guidance on the matter, one who is entitled to the protection of the *audi alteram partem* rule is now *prima facie* entitled to put his case orally'. Again, if there are contending parties before the adjudicating authority and one of them is permitted to give oral hearing the same facility must be afforded to the other,²⁵ or where complex legal and technical questions are involved or where stakes are very high, it is necessary to give oral hearing.²⁶ Thus, in the absence of statutory requirement about oral hearing, courts will have to decide the matter taking into consideration the facts and circumstances of the case.

(d) Right of Counsel

The right of representation by a lawyer is not considered to be a part of natural justice and it cannot be claimed as of right,²⁷ unless the said right is conferred by the statute.²⁸ In *Pett v. Greyhound Racing Assn. (II)*²⁹, Lyell, J. observed:

'I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It

Co. v. Central Board of Direct Taxes, 1989 Supp (2) SCC 462; *Union of India v. Amrik Singh*, (1991) 1 SCC 654; AIR 1991 SC 564.

21. Per Krishna Iyer, J. in *Shrikrishnadas v. State of M.P.*, (1977) 2 SCC 741 (745): AIR 1977 SC 1691 (1694).

22. Wade: *Administrative Law*, 1994, p. 537.

23. *Standard Airlines v. Civil Aeronautics Board*, (1949) F 2d 18 (21).

24. *Judicial Review of Administrative Action*, 1995, p. 437.

25. *R. v. Kingston-upon-Hull Rent Tribunal*, (1949) 65 TLR 209.

26. *Travancore Rayons v. Union of India*, (1969) 3 SCC 868 (871): AIR 1970 SC 862 (864); *State of U.P. v. Maharaja Dharmander Prasad Singh*, (1989) 2 SCC 505 (525): AIR 1989 SC 997 (1010-11).

27. *Kalindi v. Tata Locomotives*, AIR 1960 SC 914: (1960) 3 SCR 407; *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405 (439): AIR 1978 SC 851 (876).

28. *H.C. Sarin v. Union of India*, (1976) 4 SCC 765: AIR 1976 SC 1686.

29. (1969) 2 All ER 221: (1970) 1 QB 46: (1969) 2 WLR 1228.

seems to me that *it arises only in a society which has reached some degree of sophistication in its affairs.*"³⁰ (emphasis supplied)

But speaking generally, the right to appear through a counsel has been recognised in Administrative Law. C.K. Allen³¹ rightly says, "[E]xperience has taught me that to deny persons who are unable to express themselves the services of a competent spokesman is a very mistaken kindness." In *Pett v. Greyhound Racing Assn. (I)*³², Lord Denning observed:

"[W]hen a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.... *Even a prisoner can have his friend.*"³³ (emphasis supplied)

de Smith³⁴ is also of opinion that in general, "legal representation of the right quality before statutory tribunals is desirable, and that a *person threatened with social or financial ruin by disciplinary proceedings in a purely domestic forum may be gravely prejudiced if he is denied legal representation*". (emphasis supplied)

Some statutes do not permit appearance of legal practitioners; e.g. factory laws; some statutes permit appearance of advocates only with the permission of the tribunal concerned, e.g. Industrial Disputes Act, 1947; while in some statutes, the right to be represented through an advocate is recognised, e.g. Income Tax Act, 1961.

Section 30 of the Advocates Act, 1961 confers an absolute right on every advocate to practise in all courts including the Supreme Court, before any tribunal or person legally authorised to take evidence and before any authority or person before whom such advocate is or under any law for the time being in force entitled to practise.³⁵

If the matter is very simple, e.g. whether the amount in question is paid or not,³⁶ or whether the assessment orders were correct,³⁷ the request for legal representation can be rejected. On the other hand, if the oral evidence produced at the inquiry requires services of a lawyer for cross-

30. *Id.* at p. 231 (AER): 66 (QB).

31. *Administrative Jurisdiction*, 1956, p. 79.

32. (1968) 2 All ER 545; (1969) 1 QB 125; (1968) 2 WLR 1471.

33. *Id.* at p. 549 (AER): 132 (QB).

34. *Judicial Review of Administrative Action*, 1995, pp. 452-53.

35. It may be noted at this stage that though more than thirty years have passed, the provisions of S. 30 of the Act have not been brought in force. See in this connection *Aeltemesh Rein v. Union of India*, (1988) 4 SCC 54; AIR 1988 SC 1768.

36. *H.C. Sarin v. Union of India*, (1976) 4 SCC 765; AIR 1976 SC 1686.

37. *Krishna Chandra v. Union of India*, (1974) 4 SCC 374; AIR 1974 SC 1589.

examination of witnesses, or legal complexity is involved therein, or where complicated questions of fact and law arise, or where the evidence is voluminous and the party concerned may not be in a position to meet with the situation effectively or where he is pitted against a trained prosecutor, he should be allowed to engage a legal practitioner to defend him 'lest the scales should be weighed against him'.³⁸ These are all relevant grounds and in these circumstances, refusal to permit legal assistance may cause serious prejudice to the person concerned and may amount to a denial of reasonable opportunity of being heard.

(e) *Right of 'friend'*

In departmental proceedings and domestic inquiries, an employee or a workman is normally allowed to represent his case through his friend, co-worker or representative of the Union. According to the Supreme Court³⁹, it is desirable that in domestic inquiries, employees should be given liberty to represent their case by persons of their choice, if there is no standing order against such a course being adopted and if there is nothing otherwise objectionable in the said request.

In *A.K. Roy v. Union of India*⁴⁰, it was contended that a detenu has a right to represent his case through a lawyer. The Supreme Court negated the contention. It, however, held that a detenu had a right to be assisted by a friend. "It may be that denial of legal representation is not denial of natural justice *per se*, and, therefore, if a statute excludes that facility explicitly, it would not be open to the tribunal to allow it. But, it is not fair, and the statute does not exclude that right, that the detenu should not even be allowed to take the aid of a friend. *Whenever demanded, the Advisory Boards must grant that facility.*"

(emphasis supplied)

(f) *General principles*

The following propositions can be said to have been established:

- (1) The adjudicating authority must be impartial and without any interest or bias of any type.⁴¹

38. *C.L. Subramaniam v. Collector of Customs*, (1972) 3 SCC 542: AIR 1972 SC 2178; see also *A.K. Roy v. Union of India*, (1982) 1 SCC 271 (335): AIR 1982 SC 710 (747); *Board of Trustees v. Dilip Kumar*, (1983) 1 SCC 124: AIR 1983 SC 109; *J.K. Aggarwal v. Haryana Seeds Development Corpn.*, (1991) 2 SCC 283: AIR 1991 SC 1221; *Maharashtra State Board of Education v. K.S. Gandhi*, (1991) 2 SCC 716 (735), *Crescent Dyes & Chemicals Ltd. v. Ram Naresh*, (1993) 2 SCC 115.

39. *Dunlop Rubber Co. v. Workmen*, AIR 1965 SC 1392: (1965) 2 SCR 139.

40. (1982) 1 SCC 271 (335-36): AIR 1982 SC 710 (747-48).

41. For detailed discussion see 'Bias or interest' (*supra*).

- (2) Where the adjudicating authority is exercising judicial or quasi-judicial power, the order must be made by that authority and that power cannot be delegated or sub-delegated to any other officer.⁴²
- (3) The adjudicating authority must give full opportunity to the affected person to produce all the relevant evidence in support of his case. In *Malikram v. State of Rajasthan*⁴³, the scope of hearing was confined by the inquiry officer only to the hearing of arguments and rejected the application of the appellant to lead oral or documentary evidence. The Supreme Court set aside the decision.
- (4) The adjudicating authority must disclose all material placed before it in the course of the proceedings and cannot utilise any material unless the opportunity is given to the party against whom it is sought to be utilised. Thus, in *Dhakeswari Cotton Mills v. CIT*,⁴⁴ the Supreme Court set aside the order passed by the Income Tax Appellate Tribunal on the ground that it did not disclose some evidence to the assessee produced by the department.
- (5) The adjudicating authority must give an opportunity to the party concerned to rebut the evidence and material placed by the other side. In *Bishambhar Nath v. State of U.P.*⁴⁵, in revision proceedings, the Custodian-General accepted new evidence produced by one party, but no opportunity was given to the other side to meet with the same. The Supreme Court held that the principles of natural justice were violated.
- (6) An adjudicating authority must disclose the evidence which it wants to utilise against the person concerned and also give him an opportunity to rebut the same; but it does not necessarily mean that the right of cross-examination of witnesses should be given to him. It depends upon the facts and circumstances of each case and the statutory provisions.⁴⁶

Generally, in disciplinary proceedings under Article 311 of the Constitution of India against the civil servants⁴⁷ and in cases of domestic

42. For detailed discussion see 'Sub-delegation of judicial power'; Lecture V (*supra*).

43. AIR 1961 SC 1575; (1962) 1 SCR 978.

44. AIR 1955 SC 65; (1955) 1 SCR 941; see also *M.P. Industries v. Union of India*, AIR 1966 SC 671; (1966) 1 SCR 466.

45. AIR 1966 SC 573; (1966) 2 SCR 158; but see *Fedco Ltd. v. S.N. Bilgrami*, AIR 1960 SC 415; (1960) 2 SCR 408.

46. de Smith; *Judicial Review of Administrative Action*, 1995, pp. 454-57.

47. *Khemchand v. Union of India*, AIR 1958 SC 300; *Union of India v. T.R. Verma*,

inquiries by employers against their employees under the factory laws,⁴⁸ it is held that the right of cross-examination of witnesses is necessary.

In *State of Kerala v. K.T. Shaduli*⁴⁹, the returns filed by the respondent-assessee on the basis of his books of account appeared to the Sales Tax Officer to be incomplete and incorrect, since certain sales appearing in the books of accounts of a wholesale dealer were not mentioned in the account books of the respondent. The respondent applied to the S.T.O. for opportunity to cross-examine the wholesale dealer which was rejected by him. Holding the decision of the S.T.O. to be illegal, the Supreme Court held that the respondent could prove the correctness and completeness of his returns only by showing that the entries in the books of accounts of the wholesale dealer were false and bogus and this obviously the respondent could not do unless he was given an opportunity to cross-examine the wholesale dealer.

On the other hand, in externment proceedings,⁵⁰ and in proceedings before the customs authorities to determine whether the goods were smuggled⁵¹ the right of cross-examination is not necessary.

In *Hira Nath Mishra v. Principal, Rajendra Medical College*⁵², the appellants-male students, entered quite naked into the compound of the girls' hostel late at night. Thirty-six girl students filed a confidential complaint with the Principal of the college, who appointed an Inquiry Committee. The Committee recorded the statements of girl students but not in presence of the appellants. The photographs of the appellants were mixed up with 20 photographs of other students and the girls 'by and large' identified the appellants. The appellants were then called upon by the Committee and they were told about the charges against them. The appellants denied the charges and stated that they had never left their hostel. The Committee found the appellants guilty and finally they were expelled from the college.

The said order was challenged by the appellants as violative of the principles of natural justice inasmuch as the statements of the girl students were recorded behind their back and that no opportunity was given to them to cross-examine those girl students. The Supreme Court rejected

AIR 1957 SC 882.

48. *Central Bank of India v. Karunamoy*, AIR 1968 SC 266; *Meenglass Tea Estate v. Workmen*, AIR 1963 SC 1719.

49. (1977) 2 SCC 777; AIR 1977 SC 1627.

50. *Gurbachan v. State of Bombay*, AIR 1952 SC 221.

51. *Kanungo & Co. v. Collector of Customs*, (1973) 2 SCC 435, AIR 1972 SC 2136.

52. (1973) 1 SCC 805; AIR 1973 SC 1260.

these contentions. According to the Court "the girls would not have ventured to make their statements in the presence of the miscreants because if they did, they would have most certainly exposed themselves to retaliation and harassment thereafter. The college authorities are in no position to protect the girl students outside the college precincts."

- (7) Oral or personal hearing is not a part of natural justice and cannot be claimed as of right.⁵³
- (8) Representation through counsel or an advocate also cannot be claimed as a part of natural justice.⁵⁴
- (9) The adjudicating authority is not *always* bound to give reasons in support of its order, but the recent trend is that it is considered to be a part of natural justice.⁵⁵
- (10) If hearing is not given by the adjudicating authority to the person concerned and the principles of natural justice are violated the order is void and it cannot be justified on the ground that no prejudice was caused to the petitioner⁵⁶; or that 'hearing could not have made any difference'⁵⁷ or that 'no useful purpose would have been served'⁵⁸. In *General Medical Council v. Spackman*⁵⁹, Lord Wright observed: "If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice. *The decision must be declared to be no decision.*"

(emphasis supplied)

Thus, in *Board of High School v. Kumari Chitra*⁶⁰, the Board cancelled the examination of the petitioner who had actually appeared at the examination on the ground that there was shortage in attendance at lectures. But no notice was given to her before taking the action. The order

53. See 'Oral Hearing' under that head (*supra*).

54. See 'Right of Counsel' under that head (*supra*).

55. See 'Speaking Orders' under that head (*supra*).

56. *Nally Bharat Engg. Co. Ltd. v. State of Bihar*, (1990) 2 SCC 48.

57. *Ridge v. Baldwin*, (1964) AC 40; (1963) 2 All ER 66; (1963) 2 WLR 935; Wade: *Administrative Law*, 1994, pp. 526-28; *S.L. Kapoor v. Jagmohan*, (1980) 4 SCC 379 (395); AIR 1981 SC 136 (147); *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613 (705); AIR 1990 SC 1480.

58. *Board of High School v. Kumari Chitra*, (1970) 1 SCC 121; AIR 1970 SC 1039; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; AIR 1978 SC 597. But see *State Bank of Patiala v. S.K. Sharma*, (1996) 3 SCC 364; AIR 1996 SC 1669.

59. (1943) AC 627 (654-55); (1943) 2 All ER 337.

60. (1970) 1 SCC 121 (123); AIR 1970 SC 1039 (1040).

was challenged as violative of the principles of natural justice. On behalf of the Board it was contended that the facts were not in dispute and, therefore, '*no useful purpose would have been served*' by giving a show-cause notice to the petitioner. The Supreme Court set aside the decision of the Board, holding that the Board was acting in a quasi-judicial capacity and, therefore, it must observe the principles of natural justice.

- (11) As a general rule, hearing should be afforded before a decision is taken and not afterwards.⁶¹
- (12) A hearing given on appeal is not an acceptable substitute for a hearing not given before the initial decision.⁶²
- (13) In exceptional circumstances, hearing may be excluded.⁶³

(3) Speaking orders

(a) *Meaning*

A 'speaking order' means an order speaking for itself. To put it simply, every order must contain reasons in support of it.

(b) *Importance*

Giving of reasons in support of an order is considered to be the third principle of natural justice. According to this, a party has a right to know not only the result of the inquiry but also the reasons in support of the decision.

(c) *Object*

There is no general rule of English law that reasons must be given for administrative or even judicial decisions.⁶⁴ In India also, till very recently it was not accepted that the requirement to pass speaking orders is one of the principles of natural justice. But as Lord Denning⁶⁵ says, 'the giving of reasons is one of the fundamentals of good administration'. The condition to record reasons introduces clarity and excludes arbitrariness and satisfies the party concerned against whom the order is passed. Today, the old 'police State' has become a 'welfare State'. The governmental functions have increased, administrative tribunals and other executive authorities have come to stay and they are armed with wide discretionary powers and there are all possibilities of abuse of power by them. To provide a safeguard against the arbitrary exercise of powers

61. See 'Pre-decisional and post-decisional hearing', (*infra*).

62. See 'Hearing at appellate stage', (*infra*).

63. See 'Exclusion of natural justice', (*infra*).

64. de Smith: *Judicial Review of Administrative Action*, 1995, p. 457; Wade: *Administrative Law*, 1994, pp. 541-45.

65. *Breen v. Amalgamated Engg. Union*, (1971) 1 All ER 1148 (1154); (1971) 2 QB 175; (1971) 2 WLR 742.

by these authorities, the condition of recording reasons is imposed on them. It is true that even the ordinary law courts do not *always* give reasons in support of the orders passed by them when they dismiss appeals and revisions summarily. But regular courts of law and administrative tribunals cannot be put at par. I must quote here the following powerful observations of Subba Rao, J. (as he then was) in *M.P. Industries v. Union of India*⁶⁶:

“There is an essential distinction between a Court and an administrative tribunal. A Judge is trained to look at things objectively, but, an executive officer generally looks at things from the standpoint of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties: and *the least they should do is to give reasons for their orders*.⁶⁷ (emphasis supplied)

(d) Express provision whether necessary

If the statute requires recording of reasons, then it is the statutory requirement and, therefore, there is no scope for further inquiry. But even when the statute does not impose such an obligation, it is necessary for the quasi-judicial authority to record reasons, as it is the ‘only visible safeguard against possible injustice and arbitrariness’ and affords protection to the person adversely affected. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision, whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.⁶⁸ The courts insist upon disclosure of reasons in support of the order on three grounds: (1) the party aggrieved has the opportunity to demonstrate before the appellate or revisional court that the reasons which persuaded the authority to reject his case were erroneous; (2) the obligation to record reasons operates as a deterrent against possible arbitrary action by executive authority invested with judicial power; and (3) it gives satisfaction to the party against whom the order is made. The power to refuse to disclose reasons

66. AIR 1966 SC 671: (1966) 1 SCR 466.

67. *Id.* at p. 675 (AIR).

68. *Union of India v. M.L. Capoor*, (1973) 2 SCC 836 (853-54); AIR 1974 SC 87 (93-94).

in support of the order is 'exceptional in nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation'.⁶⁹ (emphasis supplied)

Every action of the State must satisfy the rule of non-arbitrariness. Recording of reasons is, therefore, implicit even in absence of statutory provision in that regard.⁷⁰

(e) Where order is subject to appeal or revision

If the order passed by the adjudicating authority is subject to appeal or revision, the appellate or revisional court will not be in a position to understand what weighed with the authority and whether the grounds on which the order was passed were relevant, existent and correct; and the exercise of the right of appeal would be futile. In *CIT v. Walchand*⁷¹, Shah, J. (as he then was) rightly observed: "The practice of recording a decision without reasons in support cannot but be deprecated."

In *S.N. Mukherjee v. Union of India*⁷², the Supreme Court observed that except in cases where the requirement of recording reasons has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions must record reasons in support of their decisions. The considerations for recording reasons are: (i) such decisions are subject to the appellate jurisdiction of the Supreme Court under Article 136 as well as supervisory jurisdiction of High Courts under Article 227; (ii) it guarantees consideration by the adjudicating authority; (iii) it introduces clarity in the decisions, and (iv) it minimises chances of arbitrariness and ensures fairness in the decision-making process.

(f) Private law

In *Raipur Development Authority v. Chokhamal*,⁷³ an award was made by an arbitrator under the Arbitration Act, 1940. It did not contain reasons. The said award was challenged *inter alia* on the ground that the arbitrator was bound to record reasons which was a requirement of natural justice. Reliance was placed on *Siemens Engg. Co. v. Union of India*⁷⁴. The court conceded that in *Siemens Engg. Co. v. Union of India*⁷⁴ "for the first time the court laid down that the rule requiring reasons in support

69. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (323): AIR 1978 SC 597 (613) (Per Chandrachud, J.).

70. *T.R. Thandur v. Union of India*, (1996) 3 SCC 690 (706): AIR 1996 SC 1643.

71. AIR 1967 SC 1435 (1437): (1967) 3 SCR 214 (217).

72. (1990) 4 SCC 594 (612): AIR 1990 SC 1984 (1995).

73. (1989) 2 SCC 721: AIR 1990 SC 1426.

74. (1976) 2 SCC 981: AIR 1976 SC 1785.

of an order is a third principle of natural justice", but drawing a distinction between *public law* and *private law* and restricting the ratio laid down in *Siemens Engg. Co.* to public law, a Division Bench of two Judges observed: "It is no doubt true that in the decisions pertaining to Administrative Law, this Court in some cases has observed that the giving of reasons in an administrative decision is a rule of natural justice by an extension of the prevailing rule. *It would be in the interest of the world of commerce that the said rule is confined to the area of Administrative Law.*"⁷⁵ (emphasis supplied)

In *Union of India v. Nambudiri*⁷⁶, a representation was made by a government servant against certain adverse remarks made in his confidential record. The said representation was rejected, however, without recording reasons. The petitioner approached the Central Administrative Tribunal against that order and the tribunal allowed his application and quashed the order on the ground that it was vitiated since no reasons were recorded. The Union of India approached the Supreme Court.

Allowing the appeal and setting aside the order of the Tribunal, the Supreme Court observed: "[P]rinciples of natural justice do not require the administrative authority to record reasons for the decision as there is no general rule that reasons must be given for administrative decision. Order of an administrative authority which has no statutory or implied duty to state reasons or the grounds of its decision is not rendered illegal merely on account of absence of reasons. *It has never been a principle of natural justice that reasons should be given for decisions.*"⁷⁷

(emphasis supplied)

A special reference may be made in this connection to a decision of the Constitution Bench of the Supreme Court in *S.N. Mukherjee v. Union of India*⁷⁸. In that case the appellant, a Major in the Indian Army was charge-sheeted and tried by General Court Martial. Since some of the charges were held proved, punishment of dismissal was awarded. The findings were confirmed by the Chief of the Army Staff though reasons were not recorded for such confirmation. The post-confirmation petition of the appellant was dismissed by the Central Government. His writ petition was also dismissed. The appellant approached the Supreme Court. A substantial question of law was raised in the appeal, namely, whether recording of reasons in support of an order can be said to be one of the

75. (1989) 2 SCC 721(751): AIR 1990 SC 1426 (1444).

76. (1991) 3 SCC 38: AIR 1991 SC 1216.

77. *Id.* at p. 45 (SCC): 1219 (AIR).

78. (1990) 4 SCC 594: AIR 1990 SC 1984.

principles of natural justice. The Constitution Bench decided the said question in the affirmative. Referring to a number of leading cases on the point, Agarwal, J. observed: "Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that *the requirement to record reasons can be regarded as one of the principles of natural justice* which govern exercise of power by administrative authorities."⁷⁹ (emphasis supplied)

(g) Recording of reasons whether part of natural justice

A difficult and controversial question, however, is: Whether recording of reasons can be said to be one of the principles of natural justice? As already discussed, two principles of natural justice are well-established: (i) no man shall be a judge in his own cause (*nemo debet esse judex in propria causa*); and (ii) no man should be condemned unheard (*audi alteram partem*).

For the first time in *Siemens Engg. Co. v. Union of India*⁸⁰, the Supreme Court held that the rule requiring reasons to be recorded by quasi-judicial authorities in support of the orders passed by them must be held to be a basic principle of natural justice. Speaking for the Court, Bhagwati, J. (as he then was) observed:

"The rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem*, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."⁸¹

(emphasis supplied)

His Lordship reiterated the above view in the leading case of *Maneka Gandhi v. Union of India*⁸². "The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim *audi alteram partem*."

(h) Non-existence and non-communication of reasons

Again, the distinction between "non-existence of reasons" and "non-communication of reasons" cannot be overlooked. In a society governed by the rule of law, no action can be taken without *existence* of reasons therefor. Ordinarily, those reasons are required to be communicated to the aggrieved party, unless there is justification for non-

79. *Id.* at pp. 614 (SCC): 1996 (AIR).

80. (1976) 2 SCC 981: AIR 1976 SC 1785.

81. *Id.* at 987 (SCC): 1789 (AIR).

82. (1978) 1 SCC 248 (292): AIR 1978 SC 597 (630).

communication. But it may be that in a given case, the reasons may not be *communicated* in public interest or for the like cause. But if an order is passed or action is taken without any reason, the same is arbitrary and unreasonable and requires to be quashed and set aside.

Thus, in *Liberty Oil Mills v. Union of India*⁸³, interpreting the connotation “without assigning any reason” in clause 8-B of the Imports (Control) Order, 1955, the Supreme Court observed:

“[T]he expression ‘without assigning any reason’ implies that the decision has to be communicated, but the reasons for the decision have not to be stated. *Reasons of course, must exist for the decision....*” (emphasis supplied)

In *Shrilekha Vidyarthi v. State of U.P.*⁸⁴, the State Government by a circular terminated appointment of all Government Counsel. When the validity of the said circular was questioned in the Supreme Court, it was contended that the appointments were liable to be terminated at any time “without assigning any cause”. Construing the expression in the light of the *ratio* laid down in *Liberty Oil Mills*⁸³, the Court observed: “The non-assigning of reasons or the non-communication thereof may be based on public policy, but termination of an appointment without the existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and, therefore, against public policy.”⁸⁵

Again, in *C.B. Gautam v. Union of India*⁸⁶, interpreting the phrase “for reasons to be recorded in writing” under the Income Tax Act, the Supreme Court observed that “the order would be an incomplete order unless either the reasons are incorporated therein or are served separately alongwith the order on the affected party”. The Court stated: “*We are of the view that the reasons for the order must be communicated to the affected party.*”⁸⁷ (emphasis supplied)

(i) *General propositions*

The law relating to ‘speaking orders’ may be summed up thus:⁸⁸

- (1) Where a statute requires recording of reasons in support of the order, it imposes an obligation on the adjudicating authority and the reasons must be recorded by the authority.

83. (1984) 3 SCC 465 (492): AIR 1984 SC 1271 (1287).

84. (1991) 1 SCC 212: AIR 1991 SC 537.

85. *Id.* at p. 232 (SCC): 546 (AIR).

86. (1993) 1 SCC 78.

87. *Id.* at p. 105 (SCC); see also *Mohd. Jafar v. Union of India*, 1994 Supp (2) SCC 1.

88. For detailed discussion and leading cases, see C.K. Thakker: *Administrative Law*, 1996, pp. 198-201.

- (2) Even when the statute does not lay down expressly the requirement of recording reasons, the same can be inferred from the facts and circumstances of the case.
- (3) Mere fact that the proceedings were treated as confidential does not dispense with the requirement of recording reasons.
- (4) If the order is subject to appeal or revision (including Special Leave Petition under Article 136 of the Constitution), the necessity of recording reasons is greater as without reasons the appellate or revisional authority cannot exercise its power effectively inasmuch as it has no material on which it may determine whether the facts were correctly ascertained, law was properly applied and the decision was just and based on legal, relevant and existent grounds. Failure to disclose reasons amounts to depriving the party of the right of appeal or revision.
- (5) There is no prescribed form and the reasons recorded by the adjudicating authority need not be detailed or elaborate and the requirement of recording reasons will be satisfied if only relevant reasons are recorded.
- (6) If the reasons recorded are totally irrelevant, the exercise of power would be bad and the order is liable to be set aside.
- (7) It is not necessary for the appellate authority to record reasons when it affirms the order passed by the lower authority.
- (8) Where the lower authority does not record reasons for making an order and the appellate authority merely affirms the order without recording reasons, the order passed by the appellate authority is bad.
- (9) Where the appellate authority reverses the order passed by the lower authority, reasons must be recorded, as there is a vital difference between an order of reversal and an order of affirmation.
- (10) The validity of the order passed by the statutory authority must be judged by the reasons recorded therein and cannot be construed in the light of subsequent explanation given by the authority concerned or by filing an affidavit. *'Orders are not like old wine becoming better as they grow older'*.⁸⁹

(emphasis supplied)

89. Per Krishna Iyer, J. in *Mohinder Singh Gill v. Chief Election Comnr.*, (1978) 1 SCC 405(417); AIR 1978 SC 851 (858); (1978) 2 SCR 272.

- (11) If the reasons are not recorded in support of the order it does not *always* vitiate the action.
- (12) The duty to record reasons is a responsibility and cannot be discharged by the use of vague general words.
- (13) If the reasons are not recorded, the court cannot probe into reasoning of the order.
- (14) The doctrine of recording reasons should be restricted to public law only and should not be applied to private law e.g. arbitration proceedings.
- (15) The rule requiring reasons to be recorded in support of the order is one of the principles of natural justice.
- (16) Normally, the reasons recorded by the authority should be communicated to the aggrieved party.
- (17) Even when the reasons are not communicated to the aggrieved party in public interest, they must be in existence.
- (18) The reasons recorded by the statutory authority are always subject to judicial scrutiny.

This is the most valuable safeguard against any arbitrary exercise of power by the adjudicating authority. The reasons recorded by such authority will be judicially scrutinised, and if the court finds that the reasons recorded by such authority were irrelevant or extraneous, incorrect or non-existent, the order passed by the authority may be set aside. In *Padfield v. Minister of Agriculture*⁹⁰, the Minister gave reasons for refusing to refer the complaint to the committee and gave detailed reasons for his refusal. It was admitted that the question of referring the complaint to a committee was within his discretion. When his order was challenged, it was argued that he was not bound to give reasons and if he had not done so, his decision could not have been questioned and his giving of reasons could not put him in a worse position. The House of Lords rejected this argument and held that the Minister's decision could have been questioned even if he had not given reasons. Lord Upjohn observed:

“[I]f he does not give any reason for his decision, it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason of reaching that conclusion and order a prerogative writ to issue accordingly.”⁹¹

It is submitted that the aforesaid view is quite correct and as Lord Pearce says, ‘a Minister’s failure or refusal to record reasons cannot be

90. (1968) AC 997; (1968) 1 All ER 694; (1968) 2 WLR 924.

91. *Id.* at pp. 1061-62 (AC).

regarded as exclusion of judicial review. *By merely keeping silence the Executive cannot prevent the Judiciary from considering the whole question*'.⁹² (emphasis supplied)

The same principle is accepted in India. In *Hochtief Gammon v. State of Orissa*⁹³, the Supreme Court held that it is the duty of the court to see that the Executive acts lawfully and it cannot avoid scrutiny by courts by failing to give reasons. *"Even if the Executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts."* (emphasis supplied)

I must conclude the matter by quoting the following powerful observations of Chandrachud, J. (as he then was) in *Maneka Gandhi v. Union of India*⁹⁴:

"The reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order impounding the passport, the refusal to disclose the reasons would equally be open to the scrutiny of the Court, or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons. Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to keep the reasons away from judicial scrutiny." (emphasis supplied)

7. PRE-DECISIONAL AND POST-DECISIONAL HEARING

(a) General

As a general rule, a hearing should be afforded before a decision is taken by an authority. In the epoch-making decision of *Ridge v. Baldwin*⁹⁵, it was contended before the House of Lords that since the appellant police officer had convicted himself out of his own mouth, a prior hearing to him by the Watch Committee 'could not have made any difference'. This contention was rejected by the House of Lords for the reason that if the Watch Committee had given the police officer a prior hearing they would not have acted wrongly or unreasonably if they had in the exercise of their discretion decided to take a more lenient course than the one they had adopted.

92. *Id.* at pp. 1053-54 (AC).

93. (1975) 2 SCC 649(659); AIR 1975 SC 2226(2234).

94. (1978) 1 SCC 248(323); AIR 1978 SC 597(613).

95. (1964) AC 40; (1963) 2 All ER 66; (1963) 2 WLR 935.

The same principle is applied in India also. In *Maneka Gandhi*⁹⁶, the passport of the petitioner-journalist was impounded by the Government of India in 'public interest'. No opportunity was given to the petitioner before taking the impugned action. When the said action was challenged, the Government contended that application of the *audi alteram partem* rule would have frustrated the very purpose of impounding the passport. Even though the Supreme Court negated the argument, it accepted the doctrine of post-decisional hearing in exceptional cases. It laid down that where in an emergent situation, requiring immediate action, it is not practicable to give prior notice or hearing, the preliminary action should be soon followed by a full remedial hearing.

In *S.L. Kapoor v. Jagmohan*⁹⁷, the supersession of a municipality was challenged on the ground of violation of principles of natural justice, since no show-cause notice was issued before the impugned order. Rejecting the contention that such observance would have made no difference, the Supreme Court observed: "The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. *It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.*" (emphasis supplied)

In *Swadeshi Cotton Mills*⁹⁸, an order taking over the management of a company by the Government without prior notice or hearing was held to be bad and contrary to law. The Court said: "In the facts and circumstances of the instant case, there has been a non-compliance with such implied requirement of the *audi alteram partem* rule of natural justice at the *pre-decisional stage*. The impugned order, therefore, could be struck down on that score *alone*." (emphasis supplied)

In *Olga Tellis*⁹⁹, even though the statute empowered the Commissioner to remove the construction without notice, the Supreme Court read the *audi alteram partem* rule in it observing that reading the provision "as containing command not to issue notice *before* the removal of an encroachment will make the law invalid". (emphasis supplied)

96. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.

97. (1980) 4 SCC 379(395): AIR 1981 SC 136(147).

98. *Swadeshi Cotton Mills v. Union of India*, (1981) 1 SCC 664 (709): AIR 1981 SC 818 (844-45).

99. *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545 (581): AIR 1986 SC 180 (199); see also *Liberty Oil Mills v. Union of India*, (1984) 3 SCC 465: AIR 1984 SC 1271.

In *Institute of Chartered Accountants of India v. L.K. Ratna*¹, a member of the institute was removed on the ground of misconduct. One of the questions raised before the Supreme Court was whether such a member was entitled to a hearing before such removal. Answering the question in the affirmative, the Supreme Court quashed the order since hearing was not afforded *before* such removal.

In *Shephard v. Union of India*², certain banks were ordered to be amalgamated with some nationalised banks. Certain employees of private banks were excluded from employment in the nationalised banks. Thus, their services were terminated without giving them an opportunity of hearing. The Supreme Court rejected the proposal for a post-amalgamation hearing since 'there was no justification to think of a post-decisional hearing'. The Court rightly observed: "*It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose.*"

(emphasis supplied)

In *Trehan v. Union of India*³, a circular was issued by a government company, prejudicially altering the terms and conditions of its employees without affording an opportunity of hearing to them. In reply to the said contention, an argument was advanced by the company that *after* the impugned circular was issued, an opportunity was given to the employees with regard to the alteration made by the circular. In other words, a plea regarding post-decisional hearing was put forward. Negating the contention and following *Shephard case* (*supra*), the Supreme Court reiterated: "*In our opinion, the post-decisional opportunity of hearing does not subserve the rules of natural justice. The authority who embarks upon a post-decisional hearing will normally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity.*"

(emphasis supplied)

In *Charan Lal Sahu v. Union of India*⁴ (*Bhopal Gas Disaster case*), even though the Supreme Court came to the conclusion that prior to settlement of claims before the court, notices were required to be given to the victims and pre-decisional hearing was required to be afforded and even though post-decisional hearing was not sufficient, in the pecu-

1. (1986) 4 SCC 537: AIR 1987 SC 71.

2. (1987) 4 SCC 431 (449): AIR 1988 SC 686 (695).

3. (1989) 1 SCC 764 (770): AIR 1989 SC 568 (572).

4. (1990) 1 SCC 613: AIR 1990 SC 1480.

liar facts and circumstances of the case, the Supreme Court did not quash and set aside the settlement.

Mukharji, C.J., however, rightly observed: "Justice perhaps has been done to the victims situated as they were, but it is also true that *justice has not appeared to have been done. That is a great infirmity.*"⁵

(emphasis supplied)

(b) Hearing at appellate stage

A peculiar situation may also arise in a given case. It may happen that there may be non-compliance with natural justice at the initial stage but hearing might have been given by the appellate authority. The question obviously arises: whether a hearing afforded at the appellate stage can be treated as an acceptable substitute for a hearing not afforded at the initial stage? In other words, can failure of natural justice at the initial stage be cured by complying with natural justice at the appellate stage? In the leading case of *Leary v. National Union of Vehicle Builders*⁶, an order of expulsion of a member was passed without observing principles of natural justice. Megarry, J. rightly stated: "*As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.*"

(emphasis supplied)

Wade⁷ also says:

"If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: *instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.*"

(emphasis supplied)

The same principle is applied in India. In *Mohd. Nooh*⁸, the Supreme Court held that if an order passed by an inferior court or tribunal of first instance is null and void 'the vice' cannot be obliterated or cured on appeal or revision. Even if such an order is confirmed in appeal or revision, it does not make any difference.

In *Mysore State Road Transport Corpn. v. Mirja Khasim*⁹, an appointment of a civil servant was made by the Head of the Department while the order of dismissal was passed by the subordinate authority.

5. *Id.* at 707 (SCC): 1547 (AIR); see also *T.S. Rabari v. Govt. of Gujarat*, (1991) 32 (2) Guj LR 1035: (1991) 11(2) Guj LH 364.

6. (1970) 2 All ER 713 (720): (1971) Ch D 34 (39).

7. *Administrative Law*, 1994, p. 545.

8. *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86: 1958 SCR 595; *State Bank of Patiala v. S.K. Sharma*, (1996) 3 SCC 364.

9. (1977) 2 SCC 457: AIR 1977 SC 747.

The order was, therefore, held to be without jurisdiction, void and inoperative, having been passed in contravention of Article 311 of the Constitution. The fact that the order was confirmed in appeal could not cure the initial defect.

In *Farid Ahmed v. Ahmedabad Municipal Corpn.*¹⁰, before compulsory acquisition of land of the appellant, he was not granted personal hearing which was required to be afforded to him. When the acquisition proceedings were challenged, it was submitted on behalf of the Corporation that an appeal was provided under the Act (Bombay Provincial Municipal Corporations Act, 1949) which was a complete substitute for personal hearing provided under the Act. Negating the contention, the Supreme Court observed: "*If the order is at inception, invalid, its invalidity cannot be cured by its approval of the Standing Committee or by its confirmation of the State Government.*" (emphasis supplied)

In *Institute of Chartered Accountants*¹¹ also, the contention was raised that even if the hearing has not been afforded at the initial stage, a right of appeal has been conferred on such member and the member can avail himself of such an opportunity of being heard at the appellate stage. Negating the contention and relying upon English and Australian judgments, the Supreme Court observed: "*There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal....* In such a case, after the blow suffered by the initial decision, it is difficult to contemplate *complete* restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, *there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding.*"

(emphasis supplied)

In the leading case of *State of U.P. v. Mohd. Nooh*¹², Das, C.J. rightly stated: "[W]here the error, irregularity or illegality touching jurisdiction

10. (1976) 3 SCC 719 (725): AIR 1976 SC 2095 (2100).

11. *Institute of Chartered Accountants of India v. L.K. Ratna*, (1986) 4 SCC 537 (553-54): AIR 1987 SC 71 (78); see also *T.S. Rabari v. Govt. of Gujarat*, (1991) 32 (2) Guj LR 1035 (1065-68): (1991) 11 (2) Guj LH 364.

12. AIR 1958 SC 86: 1958 SCR 595.

or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play, the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, *even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned.*"¹³

(emphasis supplied)

(c) Conclusions

It is submitted that the following observations of Sarkaria, J. in *Swadeshi Cotton Mills*¹⁴ regarding pre-decisional and post-decisional hearing must always be remembered by every adjudicating authority:

"In short, the general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing short of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative progress or frustrate the need for utmost promptitude. In short, *this rule of fair play "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands"*. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications."¹⁵

(emphasis supplied)

13. *Id.* at p. 94 (SCC).

14. *Swadeshi Cotton Mills v. Union of India*, (1981) 1 SCC 664: AIR 1981 SC 818.

15. *Id.* at p. 689 (SCC): pp. 831-32 (AIR).

8. EXCLUSION OF NATURAL JUSTICE

(a) General

Though the rules of natural justice, namely, *nemo judex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law, and their content and implications are well-understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. These rules can be adopted and modified by statutes and statutory rules and also by the constitution of the tribunal which has to decide a particular matter and the rules by which such tribunal is governed. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on.¹⁶

(b) Circumstances

In the following cases, the principles of natural justice may be excluded:

- (1) Where a statute either expressly or by necessary implication excludes application of natural justice;
- (2) Where the action is legislative in character, plenary or subordinate;
- (3) Where the doctrine of necessity applies;
- (4) Where the facts are admitted or undisputed;
- (5) Where the inquiry is of a confidential nature;
- (6) Where preventive action is to be taken;
- (7) Where prompt and urgent action is necessary;
- (8) Where nothing unfair can be inferred by non-observance of natural justice.

(c) Conclusions

One thing should be noted. Inference of exclusion of natural justice should not be readily made unless it is irresistible, since the courts act on presumption that the legislature intends to observe the principles of natural justice and those principles do not supplant but supplement the law of the land. Therefore, all statutory provisions must be read, inter-

16. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 207-15.

preted and applied so as to be consistent with the principles of natural justice.

It is submitted that the following observations of Chandrachud, C.J. in the leading case of *Olga Tellis v. Bombay Municipal Corpn.*¹⁷ lay down correct proposition of law. His Lordship observed:

"The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A *departure from this Fundamental Rule of natural justice may be presumed to have been intended by the legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.*"¹⁸

(emphasis supplied)

9. EFFECT OF BREACH OF NATURAL JUSTICE: VOID OR VOIDABLE

(a) General

A complicated and somewhat difficult question is: What is the effect of breach or contravention of the principles of natural justice? Does it go to the root of the matter rendering a decision void or merely voidable? A voidable order is an order which is legal and valid unless it is set aside by a competent court at the instance of an aggrieved party. On the other hand, a void order is not an order in the eye of law. It can be ignored, disregarded, disobeyed or impeached in any proceeding before any court or tribunal. It is a stillborn order, a nullity and void *ab initio*.

(b) England

There has been difference of opinion in England on this point. In some cases, the courts have taken the view that non-compliance of the principles of natural justice does not vitiate the order and the order cannot be said to be a nullity or void *ab initio* but merely voidable which could be set aside at the instance of an aggrieved party. While in other cases the courts have taken the view that non-observance of the principles of natural justice renders the order null and void.¹⁹

17. (1985) 3 SCC 545; AIR 1986 SC 180.

18. *Id.* at p. 581, para 45 (SCC); p. 199 (AIR); see also *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (291); AIR 1978 SC 597; *Union of India v. Amri Singh*, (1991) 1 SCC 654; AIR 1991 SC 564.

19. For case-law, see C.K. Thakker: *Administrative Law*, 1996, p. 216.

c) India

So far as India is concerned, it is fairly well settled and courts have consistently taken the view that whenever there is violation of any rule of natural justice, the order is null and void. Thus, where appointment of a government servant is cancelled without affording an opportunity of hearing²⁰, or where an order retiring a civil servant on the ground of reaching superannuation age was passed without affording an opportunity to the employee,²¹ or where a passport of a journalist was impounded without issuing notice;²² or where a liability was imposed by the Commission without giving an opportunity of being heard to the assessee;²³ the actions were held to be a nullity and orders *void ab initio*. The same principle applies in respect of bias and interest. A judgment which is the result of bias or want of impartiality is a nullity and the trial '*coram non iudice*'.²⁴ (emphasis supplied)

An interesting question arose in *Nawabkhan v. State of Gujarat*²⁵. In this case, an order of externment was passed against the petitioner on September 5, 1967 under the Bombay Police Act, 1951. In contravention of the said order, the petitioner entered the forbidden area on September 17, 1967 and was, therefore, prosecuted for the same. During the pendency of the criminal case, the order of externment was quashed by the High Court under Article 226 of the Constitution on July 16, 1968. The trial court acquitted the petitioner but the High Court convicted him, because according to the High Court, contravention of the externment order took place when the order was still operative and was not quashed by the High Court. Reversing the decision of the High Court, the Supreme Court held that as the externment order was held to be illegal and unconstitutional, it was of no effect and the petitioner was never guilty of flouting 'an order which never legally existed'.

Krishna Iyer, J. rightly observed: "[N]ullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative

20. *Shridhar v. Nagar Palika, Jaunpur*, 1990 Supp SCC 157; AIR 1990 SC 307; *Shrawan Kumar v. State of Bihar*, 1991 Supp (1) SCC 330; AIR 1991 SC 309.

21. *State of Orissa v. Binapani (Dr)*, AIR 1967 SC 1269; (1967) 2 SCR 625.

22. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; AIR 1978 SC 597.

23. *R.B. Shreeram Durga Prasad v. Settlement Commission*, (1989) 1 SCC 628; AIR 1989 SC 1038.

24. *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86; 1958 SCR 595; *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262; AIR 1970 SC 150; *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611; AIR 1987 SC 2386; *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602; AIR 1988 SC 1531.

25. (1974) 2 SCC 121; AIR 1974 SC 1471.

authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void and *ab initio* of no legal efficacy.... An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. *Beyond doubt, an order which infringes a fundamental freedom passed in the violation of audi alteram partem rule is a nullity.*"²⁶ (emphasis supplied)

(d) Test

It would not be correct to say that for any and every violation of a facet of natural justice, an order passed is always null and void. The validity of the order has to be tested on the touchstone of prejudice. *The ultimate test is always the same, viz. the test of prejudice or the test of fair hearing.*²⁷ (emphasis supplied)

(e) Conclusions

One thing, however, must be noted. Even if the order passed by an authority or officer is *ultra vires*, against the principles of natural justice and, therefore, null and void, it remains operative unless and until it is declared to be so by a competent court. Consequent upon such declaration, it automatically collapses and it need not be quashed and set aside. But in absence of such a declaration, even an *ex facie* invalid or void order remains in operation *de facto* and it can effectively be resisted in law only by obtaining the decision of the competent court.²⁸

10. WHERE NATURAL JUSTICE VIOLATED: ILLUSTRATIVE CASES

- (1) Where the Commercial Tax Officer assessed the appellant merely on the instructions received from the Assistant Commissioner, without giving an opportunity to the party to meet the opinion of the superior authority, it was held that the procedure was quite unfair and calculated to undermine the confidence of the public in the impartial administration of the Sales Tax Department.²⁹
- (2) Proceedings under taxation laws being quasi-judicial proceedings, rules of natural justice required that an opportunity should be given to a person to cross-examine those who have made state-

26. *Id.* at pp. 130-33 (SCC): 1478-80 (AIR).

27. *State Bank of Patiala v. S.K. Sharma*, (1996) 3 SCC 364 (390): AIR 1996 SC 1669.

28. *State of Punjab v. Gurdev Singh*, (1991) 4 SCC 1: AIR 1991 SC 2219; *Smith v. East Elloe Rural District Council*, (1956) AC 736: (1956) 1 All ER 855; *Calvin v. Carr*, (1980) AC 574: (1979) 2 All ER 440: (1979) 2 WLR 755; Wade: *Administrative Law*, 1994, pp. 516-18; M.P. Jain: *Treatise on Administrative Law*, 1996, Vol. 1, pp. 448-84.

29. *Mahadaya Premchandra v. C.T.O.*, AIR 1958 SC 667: 1959 SCR 551.

ments which have been used against him. The order gets vitiated when this is not observed.³⁰

- (3) Where one of the members of the Selection Committee was himself a candidate for selection, the principles of natural justice were violated.³¹
- (4) Where author-members were present in the committee constituted for selection of books written by them, it was violative of the rules of natural justice.³²
- (5) A student who was charged with malpractices in answering an examination when not given a reasonable and fair opportunity to be heard in defence, an order debarring him was quashed.³³
- (6) Where personal hearing is given by one officer and order is passed by another officer, the order is impeachable on the ground of violation of principles of natural justice.³⁴
- (7) Where a permanent employee of the Road Transport Corporation was absent without leave and without reasonable cause and his services were terminated without giving him an opportunity to show cause, the order was quashed.³⁵ The same principle applies to government servants also.³⁶
- (8) Where the Chairman of the tribunal has confirmed an order passed by the Review Committee wherein he was also one of the members recommending premature retirement of a government servant, he was disqualified to decide the said matter.³⁷
- (9) Where in a contract between the Government and a private contractor, a Government officer decided that the private contractor

30. *State of Kerala v. K.T. Shaduli*, (1977) 2 SCC 777; AIR 1977 SC 1627; see also *Town Area Committee v. Jagdish Prasad*, (1979) 1 SCC 60; AIR 1978 SC 1407.

31. *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262; AIR 1970 SC 150; see also *Kirti Deshmanker v. Union of India*, (1991) 1 SCC 104.

32. *J. Mohapatra v. State of Orissa*, (1984) 4 SCC 103; AIR 1984 SC 1572.

33. *Board of High School v. Ghanshyam*, AIR 1962 SC 1110; 1962 Supp (3) SCR 36; *Nagaraj v. University of Mysore*, AIR 1961 Mys 164.

34. *Gullapalli I*, AIR 1959 SC 308; 1959 Supp (1) SCR 319.

35. *Mafatlal v. Divl. Controller, State Transport*, AIR 1966 SC 1364; (1966) 3 SCR 40.

36. *Jai Shanker v. State of Rajasthan*, AIR 1966 SC 492; (1966) 1 SCR 825; *Deokinandan Prasad v. State of Bihar*, (1971) 2 SCC 330; AIR 1971 SC 1409; *State of Assam v. Akshaya Kumar*, (1975) 4 SCC 399; AIR 1976 SC 37.

37. *Baidyanath Mahapatra v. State of Orissa*, (1989) 4 SCC 664; AIR 1989 SC 2218; see also *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86; 1958 SCR 595.

had committed breach of agreement, it was held that the rules of natural justice were violated.³⁸

- (10) Where in a departmental enquiry, the management was allowed to be represented by a trained officer, and a delinquent officer was denied legal representation, it was held that the principles of natural justice were not observed.³⁹

II. WHERE NATURAL JUSTICE NOT VIOLATED: ILLUSTRATIVE CASES

- (1) Where in a case of smuggled gold, the petitioner was heard at length, appeared through counsel, produced witnesses and even got his goldsmith to examine the gold.⁴⁰
- (2) Where statements of some witnesses were recorded at the departmental inquiry in absence of delinquent officer, but they were made available to him subsequently for cross-examination.⁴¹
- (3) Where an opportunity of being heard had been afforded to the person against whom an action was sought to be taken, but he did not avail himself of that opportunity.⁴²
- (4) Where hearing was given by one officer and the order was passed by another officer but the officer who had passed the order had taken full note of all the objections put forward by the petitioners.⁴³
- (5) If the Reserve Bank is made the sole judge to decide whether the affairs of any banking company are being conducted in a manner prejudicial to the interest of the depositors, the Reserve Bank cannot be said to be a judge in its own cause.⁴⁴
- (6) Where the matter was simple and no complicated questions of fact and law were involved, it was held that refusal to grant

38. *State of Karnataka v. Rameshwar Rice Mills*, (1987) 2 SCC 160: AIR 1987 SC 1359.

39. *C.L. Subramaniam v. Collector of Customs*, (1972) 3 SCC 542: AIR 1972 SC 2178; *Board of Trustees v. Dilipkumar Nadkarni*, (1983) 1 SCC 124: AIR 1983 SC 109.

40. *Shermal v. Collector of Central Excise and Land Customs*, AIR 1956 Cal 621.

41. *State of U.P. v. O.P. Gupta*, (1969) 3 SCC 775: AIR 1970 SC 679.

42. *Joseph John v. State of Travancore-Cochin*, AIR 1955 SC 160: (1955) 2 SCR 1011; *F.N. Roy v. Collector of Customs*, AIR 1957 SC 648: 1957 SCR 1151; *Roshan Lal v. Ishwar Das*, AIR 1962 SC 646: (1962) 2 SCR 947; *Jethamal v. Union of India*, (1970) 2 SCC 301: AIR 1970 SC 1310.

43. *Ossein Manufacturers' Assn. v. Modi Chemicals*, (1989) 4 SCC 264: AIR 1990 SC 1744.

44. *Vellukunnel v. Reserve Bank of India*, AIR 1962 SC 1371: 1962 Supp (3) SCR 632.

legal assistance was not violative of the principles of natural justice.⁴⁵

- (7) Even where an officer can be said to be 'interested' in the cause or matter, he can participate in the proceedings if 'necessity' so requires.⁴⁶
- (8) Where the facts were admitted or allegations were not denied and the decision was taken on the basis of those facts or allegations, a complaint that no opportunity of cross-examination of the witnesses was given to the delinquent before taking impugned action was not entertained.⁴⁷
- (9) Where an order was obtained by committing fraud on the Court and on coming to know about that fact, the earlier position was restored, hearing was not necessary.⁴⁸
- (10) Where immediate action was required to be taken, nonaffording of pre-decisional hearing would not vitiate the action.⁴⁹

45. *Krishna Chandra v. Union of India*, (1974) 4 SCC 374: AIR 1974 SC 1589. For detailed discussion, see 'Right of Counsel', (*supra*).

46. *Ashok Kumar Yadav v. Union of India*, (1985) 4 SCC 417: AIR 1987 SC 454.

47. *K. L. Tripathi v. State Bank of India*, (1984) 1 SCC 43: AIR 1984 SC 273.

48. *U.P. Junior Doctors' Action Committee v. Dr Nandwani*, (1990) 4 SCC 633: AIR 1991 SC 909.

49. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597. For detailed discussion, see 'Pre-decisional and post-decisional hearing', (*supra*).

Lecture VII

Administrative Tribunals

Nothing is more remarkable in our present social and administrative arrangements than the proliferation of tribunals of many different kinds. There is scarcely a new statute of social or economic complexion which does not add to the number. —SIR C.K. ALLEN

The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience and assisted by properly qualified advocates, are fitted for the task. —LORD ROMER

[T]ribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject. —THE FRANKS COMMITTEE

SYNOPSIS

1. General
2. Status
 - (a) Constitutional recognition
 - (b) Definition
 - (c) 'Administrative tribunals': misnomer
 - (d) Administrative tribunals and Courts
 - (e) Administrative tribunals and executive authorities
 - (f) Test
 - (g) Authorities held to be tribunals: Illustrative cases
 - (h) Authorities not held to be tribunals: Illustrative cases
3. Reasons for growth of administrative tribunals
4. Administrative tribunal distinguished from court
5. Administrative tribunal distinguished from executive authority
6. Characteristics
7. Working of tribunals
 - (i) Industrial Tribunal
 - (ii) Income Tax Tribunal
 - (iii) Railway Rates Tribunal
8. Power to grant stay
9. Administrative tribunals and principles of natural justice
10. Administrative tribunals and rules of procedure and evidence
11. Reasons for decisions
12. Finality of decisions
13. Decisions of tribunals and judicial review

14. Review of decisions
15. Doctrine of res judicata
16. Administrative tribunals: Whether bound by decisions of Supreme Court and High Courts?
17. Administrative tribunals and doctrine of precedent
18. Doctrine of stare decisis
19. Contempt of administrative tribunals
20. Frank's committee
21. Constitution (42nd Amendment Act): Effect
22. *Sampath Kumar v. Union of India*
23. Post Sampath Kumar position
24. *Chandra Kumar v. Union of India*
25. Conclusions

1. GENERAL

As discussed in Lecture III, today the executive performs many quasi-legislative and quasi-judicial functions also. Governmental functions have increased and even though according to the traditional theory, the function of adjudication of disputes is the exclusive jurisdiction of the ordinary courts of law, in reality, many judicial functions have come to be performed by the executive, e.g. imposition of fine, levy of penalty, confiscation of goods, etc. The traditional theory of '*laissez faire*' has been given up and the old '*police State*' has now become a '*welfare State*', and because of this radical change in the philosophy as to the role to be played by the State, its functions have increased. Today it exercises not only sovereign functions, but, as a progressive democratic State, it also seeks to ensure social security and social welfare for the common masses. It regulates the industrial relations, exercises control over production, starts many enterprises. The issues arising therefrom are not purely legal issues. It is not possible for the ordinary courts of law to deal with all these socio-economic problems. For example, industrial disputes between the workers and the management must be settled as early as possible. It is not only in the interest of the parties to the disputes, but of the society at large. It is, however, not possible for an ordinary court of law to decide these disputes expeditiously, as it has to function, restrained by certain innate limitations. All the same, it is necessary that such disputes should not be determined in an arbitrary or autocratic manner. Administrative tribunals are, therefore, established to decide various quasi-judicial issues in place of ordinary courts of law.

2. STATUS

(a) Constitutional recognition

The status of tribunals has been recognised by the Constitution. Article 136 of the Constitution empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed or made by any tribunal in India. Likewise, Article 227 enables every High Court to exercise power of superintendence over all tribunals throughout the territories over which it exercises jurisdiction.¹

By the Constitution (42nd Amendment) Act, 1976, Articles 323-A and 323-B have been inserted by which Parliament has been authorised to constitute administrative tribunals for settlement of disputes and adjudication of matters specified therein.²

(b) Definition

It is not possible to define the word 'tribunal' precisely and scientifically. According to the dictionary meaning,³ 'tribunal' means 'a seat or a Bench upon which a Judge or Judges sit in a court', 'a court of justice'. But this meaning is very wide as it includes even the ordinary courts of law, whereas, in administrative law this expression is limited to adjudicating authorities other than ordinary courts of law.

In *Durga Shankar Mehta v. Raghuraj Singh*⁴, the Supreme Court defined 'tribunal' in the following words:

"[T]he expression 'Tribunal' as used in Article 136 does not mean the same thing as 'Court' but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from administrative or executive functions."⁵

In *Bharat Bank v. Employees*⁶, the Supreme Court observed that though tribunals are clad in many of the trappings of a court and though they exercise quasi-judicial functions, they are not full-fledged courts. Thus, a tribunal is an adjudicating body which decides controversies be-

1. For detailed discussion, see Lecture IX. (*infra*).

2. For detailed discussion, see 'Constitution (42nd Amendment) Act: Effect', (*infra*).

3. *Webster's New World Dictionary*, 1972, p. 1517; *Concise Oxford Dictionary*, (1995), p. 1489.

4. AIR 1954 SC 520: (1955) 1 SCR 267.

5. *Id.* at p. 522 (AIR).

6. AIR 1950 SC 188: 1950 SCR 459; see also *All Party Hill Leaders' Conference v. Sangma*, (1977) 4 SCC 161: AIR 1977 SC 2155; *Associated Cement Co. Ltd. v. P.N. Sharma*, AIR 1965 SC 1595: (1965) 2 SCR 366; *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*, AIR 1963 SC 677: 1963 Supp (1) SCR 242; *Rohtas Ind. Ltd. v. Staff Union*, (1976) 2 SCC 82: AIR 1976 SC 425.

tween the parties and exercises judicial powers as distinguished from purely administrative functions and thus possesses some of the trappings of a court, but not all.

(c) Administrative tribunals: misnomer

According to Wade,⁷ the expression 'administrative tribunals' is misleading for various reasons. *Firstly*, every tribunal is constituted by an Act of Parliament and not by Government. *Secondly*, decisions of such tribunals are judicial rather than administrative. A tribunal reaches a finding of fact, applies law to such fact and decides legal questions objectively and not on the basis of executive policy. *Thirdly*, all tribunals do not deal with cases in which Government is a party. Some tribunals adjudicate disputes between two private parties, e.g. disputes between landlords and tenants; employers and employees, etc. *Finally*, such tribunals are independent. 'They are in no way subject to administrative interference as to how they decide any particular case.'

M.P. Jain,⁸ therefore, suggests that it is better to designate these bodies as 'tribunals' by discarding the word 'administrative'.

(d) Administrative tribunals and Courts⁹

(e) Administrative tribunals and executive authorities¹⁰

(f) Test

A tribunal is an adjudicating authority. But the power of adjudication of disputes does not *ipso facto* make the body a 'tribunal'. In order to be a tribunal, it is essential that such power of adjudication must be derived from a statute and not from an agreement between the parties. Hence, a 'Domestic Tribunal' which is a private body set up by the agreement between the parties and designated as 'tribunal' is really not a 'tribunal'. On the other hand, Rent Control Authority or Statutory Arbitrator can be said to be tribunals though not described as such.

Thus, the basic test of a tribunal within the meaning of Article 136 or Article 227 of the Constitution is that "it is an adjudicating authority (other than a court) vested with the judicial power of the State under a statute or a statutory rule".¹¹

7. *Administrative Law*, 1994, pp. 909-10.

8. *Treatise on Administrative Law*, (1996), Vol. 1, p. 496.

9. See 'Administrative tribunal distinguished from court', (*infra*).

10. See 'Administrative tribunal distinguished from executive authority', (*infra*).

11. *Bharat Bank v. Employees* (*supra*); *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*, AIR 1963 SC 677 (685); 1963 Supp (1) SCR 242; *ACC v. P.N. Sharma*, AIR 1965 SC 1595 (1608-09); (1965) 2 SCR 366.

(g) Authorities held to be tribunals: Illustrative cases

Applying the above test, let us consider the position of some of the authorities. The following authorities have been held tribunals within the meaning of Article 227:

- (i) Election Tribunal.
- (ii) Industrial Tribunal.
- (iii) Revenue Tribunal.
- (iv) Rent Control Authority.
- (v) Excise Appellate Authority.
- (vi) Commissioner for Religious Endowments.
- (vii) Panchayat Court.
- (viii) Custodian of Evacuee Property.
- (ix) Payment of Wages Authority.
- (x) Statutory Arbitrator.

(h) Authorities not held to be tribunals: Illustrative cases

On the other hand, the following authorities are held not tribunals under Article 227:

- (i) Domestic Tribunal.
- (ii) Conciliation Officer.
- (iii) Military Tribunal.
- (iv) Private Arbitrator.
- (v) Legislative Assembly.
- (vi) Registrar acting as a Taxing Officer.
- (vii) Customs Officer.
- (viii) Zonal Manager of Life Insurance Corporation of India.
- (ix) Advisory Board under Preventive Detention Laws.
- (x) State Government exercising power to make a reference under the Industrial Disputes Act.

3. REASONS FOR GROWTH OF ADMINISTRATIVE TRIBUNALS

According to Dicey's theory of rule of law, the ordinary law of the land must be administered by ordinary law courts. He was opposed to the establishment of administrative tribunals. According to the classical theory and the doctrine of separation of powers, the function of deciding disputes between the parties belonged to ordinary courts of law. But, as discussed above, the governmental functions have increased and ordinary courts of law are not in a position to meet the situation and solve the complex problems arising in the changed socio-economic context. In

these circumstances, administrative tribunals are established for the following reasons:

- (1) The traditional judicial system proved inadequate to decide and settle all the disputes requiring resolution. It was slow, costly, inexperienced, complex and formalistic. It was already overburdened, and it was not possible to expect speedy disposal of even very important matters: e.g. disputes between employers and employees, lock-out, strikes, etc. These burning problems cannot be solved merely by literally interpreting the provisions of any statute, but require the consideration of various other factors and this cannot be accomplished by the courts of law. Therefore, industrial tribunals and labour courts were established, which possessed the technique and expertise to handle these complex problems.
- (2) The administrative authorities can avoid technicalities. They take a functional rather than a theoretical and legalistic approach. The traditional judiciary is conservative, rigid and technical. It is not possible for the courts of law to decide the cases without formality and technicality. On the other hand, administrative tribunals are not bound by the rules of evidence and procedure and they can take a practical view of the matter to decide the complex problems.
- (3) Administrative authorities can take preventive measures, e.g. licensing, rate-fixing, etc. Unlike regular courts of law, they have not to wait for parties to come before them with disputes. In many cases, these preventive actions may prove to be more effective and useful than punishing a person after he has committed a breach of any legal provision.
- (4) Administrative authorities can take effective steps for enforcement of the aforesaid preventive measures, e.g. suspension, revocation or cancellation of licences, destruction of contaminated articles, etc. which are not generally available through the ordinary courts of law.
- (5) In ordinary courts of law, the decisions are given after hearing the parties and on the basis of the evidence on record. This procedure is not appropriate in deciding matters by the administrative authorities where wide discretion is conferred on them and the decisions may be given on the basis of the departmental policy and other relevant factors.
- (6) Sometimes, the disputed questions are technical in nature and the traditional judiciary cannot be expected to appreciate and decide them. On the other hand, administrative authorities are

usually manned by experts who can deal with and solve these problems, e.g. problems relating to atomic energy, gas, electricity, etc.

- (7) In short, as Robson says, administrative tribunals do their work 'more rapidly, more cheaply, more efficiently than ordinary courts ... possess greater technical knowledge and *fewer prejudices against Government*... give greater heed to the social interests involved... decide disputes with conscious effort at furthering social policy embodied in the legislation'.¹² (emphasis supplied)

4. ADMINISTRATIVE TRIBUNAL DISTINGUISHED FROM COURT

An administrative tribunal is similar to a court in certain aspects. Both of them are constituted by the State, invested with judicial powers and have a permanent existence. Thus, they are adjudicating bodies. They deal with and finally decide disputes between parties which affect the rights of subjects. As observed by the Supreme Court in *Associated Cement Co. Ltd. v. P.N. Sharma*¹³, 'the basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State'.

But at the same time, it must not be forgotten that an administrative tribunal is not a court. The line of distinction between a 'court' and a 'tribunal' in some cases is indeed fine though real. *All courts are tribunals but the converse need not necessarily be true*. A tribunal possesses some of the trappings of a court, but not all, and therefore, both must be distinguished:

- (1) A court of law is a part of the traditional judicial system. Where judicial powers are derived from the State and the body deals with *King's justice* it is called a 'court'. On the other hand, an administrative tribunal is an agency created by a statute and invested with judicial powers. Primarily and essentially, it is a part and parcel of the Executive Branch of the State, exercising executive as well as judicial functions. As Lord Greene¹⁴ states, administrative tribunals perform '*hybrid functions*'.
- (2) Whereas ordinary civil courts have judicial power to try all suits of a civil nature, excepting those whose cognizance is either expressly or impliedly barred, tribunals have power to try cases in special matters statutorily conferred.

12. Quoted by Kagzi: *The Indian Administrative Law*, 1973, p. 284.

13. AIR 1965 SC 1595 (1599); (1965) 2 SCR 366; *Durga Shankar Mehta v. Raghuraj Singh*, (1955) 1 SCR 267 (*supra*); *Engineering Mazdoor Sabha v. Hind Cycles Ltd.*, AIR 1963 SC 874.

14. *Johnson v. Minister of Health*, (1947) 2 All ER 395 (400).

- (3) The mere lack of general jurisdiction to try all cases of a civil nature does not necessarily lead to an inference that the forum is tribunal and not a court. A court can also be constituted with limited jurisdiction.
- (4) Judges of ordinary courts of law are independent of the executive in respect of their tenure, terms and conditions of service, etc. On the other hand, members of administrative tribunals are entirely in the hands of the Government in respect of those matters.
- (5) A court of law is generally presided over by an officer trained in law, but the president or a member of a tribunal may not be trained as well in law.
- (6) In a court of law, a Judge must be an impartial arbiter and he cannot decide a matter in which he is interested. On the other hand, an administrative tribunal may be party to the dispute to be decided by it.
- (7) A court of law is bound by all the rules of evidence and procedure but an administrative tribunal is not bound by those rules unless the relevant statute imposes such an obligation.¹⁵
- (8) A court must decide all the questions *objectively* on the basis of the evidence and materials produced before it, but an administrative tribunal may decide the questions taking into account the departmental policy or expediency and in that sense, the decision may be *subjective* rather than *objective*. "The real distinction is that the courts have an air of detachment."
- (9) While a court of law is bound by precedents, principles of *res judicata* and estoppel, an administrative tribunal is not strictly bound by them.¹⁶
- (10) A court of law can decide the 'vires' of a legislation, while an administrative tribunal cannot do so.¹⁷

5. ADMINISTRATIVE TRIBUNAL DISTINGUISHED FROM EXECUTIVE AUTHORITY

At the same time, an administrative tribunal is not an executive body or administrative department of the Government. The functions entrusted and the powers conferred on an administrative tribunal are *quasi-judi-*

5. For detailed discussion see 'Administrative tribunals and rules of procedure and evidence', (*infra*).

6. For detailed discussion see 'Administrative tribunals and rules of procedure and evidence', (*infra*).

7. *Bharat Bank v. Employees*, AIR 1950 SC 188 (206); 1950 SCR 459; *Dhulabhai v. State*, AIR 1969 SC 78; (1968) 3 SCR 662; *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261; AIR 1997 SC 1125.

cial and not *purely* administrative in nature. It cannot delegate its quasi-judicial functions to any other authority or official. It cannot give decisions without giving an opportunity of being heard to the parties or without observing the principles of natural justice. An administrative tribunal is bound to act judicially. It must record findings of facts, apply legal rules to them correctly and give its decisions. Even when the discretion is conferred on it, the same must be exercised judicially and in accordance with well-established principles of law. The prerogative writs of *certiorari* and prohibition are available against the decisions of administrative tribunals. "They are 'administrative' only because they are part of an administrative scheme for which a minister is responsible to Parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons."¹⁸

6. CHARACTERISTICS

The following are the characteristics of an administrative tribunal:¹⁹

- (1) An administrative tribunal is the creation of a statute and thus, it has a statutory origin.
- (2) It has some of the trappings of a court but not all.
- (3) An administrative tribunal is entrusted with the judicial powers of the State and thus, performs judicial and quasi-judicial functions, as distinguished from pure administrative or executive functions and is bound to act judicially.
- (4) Even with regard to procedural matters, an administrative tribunal possesses powers of a court; e.g. to summon witnesses, to administer oath, to compel production of documents, etc.
- (5) An administrative tribunal is not bound by strict rules of evidence and procedure.
- (6) The decisions of most of the tribunals are in fact judicial rather than administrative inasmuch as they have to record findings of facts *objectively* and then to apply the law to them without regard to executive policy. Though the discretion is conferred on them, it is to be exercised objectively and judicially.
- (7) Most of the administrative tribunals are not concerned *exclusively* with the cases in which Government is a party; they also decide disputes between two private parties, e.g. Election Tribunal, Rent Tribunal, Industrial Tribunal, etc. On the other hand, the Income Tax Tribunal always decides disputes between the Government and the assesseees.

18. Wade: *Administrative Law*, 1994, p. 909.

19. *Franks Report*, 1957; Cmnd. 218, para 40.

- (8) Administrative tribunals are independent and they are not subject to any administrative interference in the discharge of their judicial or quasi-judicial functions.
- (9) The prerogative writs of *certiorari* and prohibition are available against the decisions of administrative tribunals.

Thus, taking into account the functions being performed and the powers being exercised by administrative tribunals we may say that they are neither exclusively judicial nor exclusively administrative bodies, but are partly administrative and partly judicial authorities.

7. WORKING OF TRIBUNALS

There are a number of administrative tribunals in India. For example, Industrial Tribunals, Labour Courts, established under various Industrial Laws, Railway Rates Tribunal established under the Indian Railways Act, Election Tribunals established under the Representation of the People Act, Mines Tribunals established under the Indian Mines Act, Rent Controller appointed under the Rent Acts, Workmen's Compensation Commissioners appointed under the Workmen's Compensation Act, etc.

Let us study the actual working of some of the tribunals to understand the constitution of the tribunals, the procedure adopted by them and their powers and duties.

(i) Industrial Tribunal

The Industrial Tribunal is set up under the Industrial Disputes Act, 1947. It can be constituted by the Central Government if an industrial dispute relates or in any way concerns the Central Government, but where the Government of India has no such direct interest, the tribunal may be constituted by the 'appropriate Government'.

The Industrial Tribunal may consist of one or more members, and they can be appointed by the Central Government or by the 'appropriate Government', as the case may be. Where such tribunal consists of two or more members, one of them will be appointed as the Chairman of the tribunal. There may be a one-man tribunal also. The Chairman of the tribunal should possess judicial qualifications, i.e. he (a) is or has been Judge of the High Court; or (b) is or has been a District Judge; or (c) is qualified for appointment as a Judge of the High Court. With regard to members other than the Chairman, they should possess such qualifications as may be prescribed. Where an industrial dispute affecting any banking or insurance company is referred to the tribunal, one of the members in the opinion of the Central Government or 'appropriate Government' should possess special knowledge of banking or insurance, as the case may be.

The jurisdiction of the tribunal extends to any industrial dispute, such as a dispute between employers and their workmen or between workmen and workmen 'connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person'.

The procedure to be followed by the Industrial Tribunal is prescribed by the Act and the rules made thereunder. The tribunal has to act judicially as it is a quasi-judicial authority. It has some of the trappings of a court. It has to apply the law and also the principles of justice, equity and good conscience.²⁰ The tribunal is vested with powers of a civil court, and it can enforce attendance of any person and examine him on oath, compel the production of documents, issue commission for examination of witnesses and such inquiry and investigation shall be deemed to be a judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860. Every member of the tribunal shall be deemed to be a 'public servant' within the meaning of Section 21 of the Penal Code.

At the same time, the tribunal has to keep in view that it deals with special types of disputes and it should not merely enforce contractual obligations. It should prevent unfair labour practices and victimisation and restore industrial peace by ensuring the salutary principle of collective bargaining.²¹

Though the function of the tribunal is to adjudicate on industrial disputes, it has only some of the trappings of the court, but not all. It is not bound by the strict rules of procedure and can take decisions by exercising discretion also. Since its object is to do social justice, 'to a large extent' it is free from the restrictions of technical considerations imposed on ordinary law courts.²² All the same, the tribunal is a quasi-judicial authority discharging quasi-judicial functions and is not purely an administrative body. Therefore, its adjudication must be on the basis of 'fairness and justness'. It has to act within the limits of the Industrial Disputes Act. Social justice divorced from the legal principles applicable to the case on hand is not permissible.²³ It has a power to adjudicate and not to arbitrate. It can decide the dispute on the basis of the pleadings and has no power to reach a conclusion without any evidence on record. Though discretion is conferred on it, the same must be exercised judiciously. It has to hold the proceedings in public. It should follow fair

20. *N.T.F. Mills v. 2nd Punjab Tribunal*, AIR 1957 SC 329: 1957 SCR 335.

21. *Llyod's Bank Ltd. v. Staff Assn.*, AIR 1956 SC 746.

22. *Bengal Chemical Works v. Employees*, AIR 1959 SC 633: 1959 Supp (2) SCR 136.

23. *J.K. Iron and Steel Co. Ltd. v. Mazdoor Union*, AIR 1956 SC 231: (1955) 2 SCR 1315.

procedure such as notice, hearing, etc. and must decide disputes fairly, independently and impartially.

The tribunal's awards are published in the Government Gazette. On due publication, the award becomes final. It is required to be signed by all the members of the tribunal. If it is not signed by all the members, the same is illegal and inoperative.²⁴

Thus, the proceedings conducted by the Industrial Tribunal are judicial proceedings and the decisions and awards are subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. The tribunal is also subject to the supervisory jurisdiction of the High Court under Article 227 of the Constitution. Article 136 of the Constitution vests the Supreme Court with discretion to entertain appeals against the orders of tribunals by granting special leave.²⁵ But having regard to the nature of powers of the Supreme Court under Article 136, the Supreme Court is slow in exercising such discretion and it interferes only in exceptional cases.²⁶

(ii) Income Tax Tribunal

The Income Tax Tribunal is constituted under the Income Tax Act, 1961. It consists of as many judicial and accountant members as the Central Government thinks fit. A judicial member must have held at least for ten years a judicial post or must have been a member of the Central Legal Service (not below Grade III) for at least three years or must have been in practice as an advocate for at least ten years. An accountant member must be a Chartered Accountant under the Chartered Accountants Act, 1949 and must have practised as such for ten years or must have served as Assistant Commissioner for at least three years. Appointments are made by the Central Government. The Chairman of the Tribunal shall be appointed from amongst the judicial members. The conditions of service of the members are regulated by the President of India in exercise of powers conferred by the proviso to Article 309 of the Constitution. The tribunal sits in benches in various cities, such as Ahmedabad, Allahabad, Bombay, Calcutta, Delhi, Madras, etc. The tribunal functions under the control of the Ministry of Law and not under the

24. *Lloyd's Bank Ltd. v. Staff Assn.*, AIR 1956 SC 746; *United Commercial Bank v. Workmen*, AIR 1951 SC 230; 1951 SCR 380.

25. See also *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261; AIR 1997 SC 1125.

26. *Express Newspapers v. Workers*, AIR 1963 SC 569; (1963) 3 SCR 540; *Bhara Bank Ltd. v. Employees*, AIR 1950 SC 188; 1950 SCR 459.

Ministry of Finance. This ensures independence of judgment by its members and inspires confidence in the assessee.

Appeals can be filed before the tribunal by an aggrieved party against orders passed by the Appellate Assistant Commissioner, Inspecting Assistant Commissioner or Commissioner within a period of 60 days. The tribunal shall decide the matter only after giving both the parties to the appeal an opportunity of being heard. If the parties do not appear at the time of hearing, the appeal may be adjourned or heard *ex parte*. The assessee is entitled to appear before the tribunal personally or through an authorised agent including a lawyer. The tribunal is not governed by the rules of evidence applicable to the courts of law and is empowered to regulate its own procedure. It gives oral hearing to the parties and passes appropriate orders. The decisions may be unanimous or by a majority opinion. If there is equal division, the members state the points of difference and the President will refer the matter for hearing to one or more other members. The matter will then be decided by a majority of all the members who have heard it. The order passed by the tribunal must be in writing and signed by the members of the Bench. It will be communicated to the assessee as well as to the Commissioner of Income Tax.

The proceedings before the tribunal are deemed to be judicial proceedings. It has the power of summoning witnesses, enforcement of attendance, discovery and inspection, production of documents and issue of commissions, as it has been given powers of a civil court under the Code of Civil Procedure, 1908. It can order prosecution of persons who produce false evidence or fabricate such evidence and they may be punished under the Indian Penal Code, 1860. It may also take appropriate actions for its contempt. It may impound and retain books of account. The proceedings of the tribunal are not open to public and there is no provision for publication of its decisions. Of course, there are various private tax journals reporting such decision, e.g. Taxation, Current Tax Reports, Taxation Law Reporter, etc.

The decisions of the tribunal on questions of fact are final. No regular appeal is provided by the Act against the decision of the tribunal even on questions of law but a reference can be made at the request of either party to the High Court on any question of law or directly to the Supreme Court if the tribunal is of the opinion that there is conflict of opinions amongst the High Courts.²⁷ From the judgment of the High Court on a

27. S. 257, Income Tax Act, 1961; see also *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261; AIR 1997 SC 1125.

reference from the tribunal, an appeal lies to the Supreme Court in a case in which the High Court certifies it to be a fit case for appeal to the Supreme Court. An aggrieved party can also invoke the jurisdiction of the Supreme Court under Article 136 of the Constitution.

(iii) Railway Rates Tribunal

Indian Railway Rates Tribunal is established under the Indian Railways Act, 1989. It consists of a Chairman who 'is or has been a Judge of the Supreme Court or of a High Court' and two members, one shall be a person who, in the opinion of the Central Government has 'special knowledge of commercial, industrial or economic conditions of the country' and the other shall be a person, who, in the opinion of the Central Government, 'has special knowledge and experience of the commercial working of the railways'. They shall be appointed by the Central Government and the terms and conditions of their appointment may be such as the Central Government may prescribe. The members so appointed are to hold office for such period as may be specified in the order of appointment, not exceeding five years. No member can be re-appointed. The tribunal may, with the sanction of the Central Government, appoint such staff and on such terms and conditions as the Central Government may determine.

The tribunal is a quasi-judicial body, having all the attributes of a civil court under the Code of Civil Procedure, 1908. It has power to summon witnesses, take evidence, order discovery and inspection of documents, issue commissions, etc. The proceedings of the tribunal are deemed to be judicial proceedings within the meaning of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. The tribunal is not bound by strict rules of evidence and procedure and is empowered to frame its own rules for the purpose of 'practice and procedure', subject to approval of the Central Government.

The tribunal has the power to hear complaints against the railway administration relating to discriminatory or unreasonable rates levied by it, classification of goods or in giving undue preference to a particular person. The tribunal acts with the aid of assessors who are selected from a panel prepared by the Central Government. This panel includes representatives of trade, industry, agriculture and persons who have a working knowledge of the railways. They are selected after consultation with the interests likely to be affected by the decisions of the tribunal.

A party before the tribunal is entitled to be heard in person or through an authorised agent including a lawyer. The decision of the tribunal is to be made by a majority of members. Its decision is final and can be

executed by a civil court 'as if it were a decree'. The tribunal can revise its order on an application being made by the railway administration if the tribunal is satisfied that 'since the order was made, there has been a material change in the circumstances'.

Since the tribunal is presided over by a Judge of the Supreme Court or a High Court, independence and impartiality is assured. This is the most valuable safeguard as the tribunal has to decide the disputes between an individual and the administration.

8. POWER TO GRANT STAY

An administrative tribunal is created by a statute. It possesses all the powers conferred on it by the parent Act. But over and above those powers, it has also power to grant interim relief during the pendency of proceedings before it.

Maxwell states: "Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."²⁸

In *ITO v. Mohd. Kunhi*,²⁹ the Income Tax Tribunal refused to grant stay during the pendency of appeal on the ground that it had no such power. The High Court, however, held that the tribunal had implied power to grant such relief. Confirming the order of the High Court, the Supreme Court said, "It is firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective."

The underlying object of such power has been succinctly described by Jessel, M.R. in the leading case of *Polini v. Grey*³⁰ in the following words:

"It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlines all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is the ultimate successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me applies as much to the court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal."

28. Maxwell on *Interpretation of Statutes*, (11th Edn.), p. 350.

29. AIR 1969 SC 430(433); (1969) 2 SCR 65; *Union of India v. Paras Laminates*, (1990) 4 SCC 453; AIR 1991 SC 696.

30. (1879) 12 Ch D 438 (443); 41 LT 173.

9. ADMINISTRATIVE TRIBUNALS AND PRINCIPLES OF NATURAL JUSTICE

As discussed above, administrative tribunals exercise judicial and quasi-judicial functions as distinguished from purely administrative functions. An essential feature of these tribunals is that they decide the disputes independently, judicially, objectively and without any bias for or prejudice against any of the parties to the dispute. The Franks Committee, in its Report (1957) has proclaimed three fundamental objectives; (i) openness, (ii) fairness, and (iii) impartiality. The Committee observed:

“In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent of departments concerned with the subject-matter of their decisions.”³¹

The above principles are accepted in India. The Law Commission in its Fourteenth Report (1958) has observed that administrative tribunals perform quasi-judicial functions and they must act judicially and in accordance with the principles of natural justice.³² Administrative Tribunals must act openly, fairly and impartially. They must afford a reasonable opportunity to the parties to represent their case and to adduce the relevant evidence. Their decisions must be *objective* and not *subjective*. Thus, in *State of U.P. v. Mohd. Nooh*³³, where the prosecutor was also an adjudicating officer, or in *Dhakeswari Cotton Mills v. CIT*³⁴, where the tribunal did not disclose some evidence to the assessee relied upon by it, or in *Bishambhar Nath v. State of U.P.*³⁵, where the adjudicating authority accepted new evidence at the revisional stage and relied upon the same without giving the other side an opportunity to rebut the same, the decisions were set aside. In *British Medical Stores v. Bhagirath*³⁶, on an application being made by the tenants, a Rent Controller made private inquiry, visited the premises in the absence of the landlord and without giving him the opportunity of being heard held that the contractual rent was excessive and fixed the standard rent, the High Court set aside the

31. Franks Report; 1957, Cmnd. 218, para 40.

32. *Report on Reform of Judicial Administration*, Vol. II, 1958, pp. 671-95.

33. AIR 1958 SC 86; 1958 SCR 595.

34. AIR 1955 SC 65; (1955) 1 SCR 941.

35. AIR 1966 SC 573; (1966) 2 SCR 158.

36. AIR 1955 Punj 5.

order as violative of the principles of natural justice. Likewise, in *Kishanchand v. C.I.T.*,³⁷ the assessee was held liable to pay income tax on the basis of a letter written by a Bank to ITO, the copy of which was never supplied to the assessee. Setting aside the assessment, the Supreme Court observed, "It is true that the proceedings under the Income Tax Law are not governed by the strict rules of evidence and therefore it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the income tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the bank with reference to the statements made by him."³⁸

10. ADMINISTRATIVE TRIBUNALS AND RULES OF PROCEDURE AND EVIDENCE

Administrative Tribunals have inherent powers to regulate their own procedure subject to the statutory requirements. Generally, these tribunals are invested with powers conferred on civil courts by the Code of Civil Procedure, 1908 in respect of summoning of witnesses and enforcement of attendance, discovery and inspection, production of documents, etc. The proceedings of administrative tribunals are deemed to be judicial proceedings for the purposes of Sections 193, 195 and 228 of the Indian Penal Code, 1860 and Sections 345 and 346 of the Code of Criminal Procedure, 1973. But these tribunals are not bound by strict rules of procedure and evidence, provided that they observe principles of natural justice and 'fair play'. Thus, technical rules of evidence do not apply to their proceedings, and they can rely on hearsay evidence or decide the questions of onus of proof or admissibility of documents, etc. by exercising discretionary powers.³⁹ In *Dhakeshwari Cotton Mills v. C.I.T.*,⁴⁰ the Supreme Court held that the Income Tax Officer was not fettered by technical rules of evidence and pleadings, and was entitled to act on materials which might not be accepted as evidence in a court of law. In *State of Mysore v. Shivabasappa*⁴¹, the Supreme Court observed: "[T]ribunals exercising quasi-judicial functions are not courts and that therefore they are not bound to follow the procedure prescribed for trial

37. 1980 Supp SCC 660: AIR 1980 SC 2117.

38. *Id.* at p. 664 (SCC): 2121 (AIR).

39. *State of Orissa v. Murlidhar*, AIR 1963 SC 404.

40. AIR 1955 SC 65: (1955) 1 SCR 941.

41. AIR 1963 SC 375 (377): (1963) 2 SCR 943; see also *K.L. Shinde v. State of Mysore*, (1976) 3 SCC 76: AIR 1976 SC 1080.

of actions in Courts nor are they bound by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in Court. *The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it.* What is a fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts."

(emphasis supplied)

In *State of Haryana v. Rattan Singh*⁴², speaking for the Court, Krishna Iyer, J. observed: "It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act.... *The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice.*"

(emphasis supplied)

It is submitted that the correct legal position has been enunciated by Diplock, J. in *R. v. Dy. Industrial Injuries Commissioner, ex parte Moore*⁴³:

"The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. *It means that he must not spin a coin or consult an astrologer, but that he must take into account any material which, as a matter of reason, has some probative value.... If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the*

42. (1977) 2 SCC 491 (493); AIR 1977 SC 1512 (1513).

43. (1965) 1 QB 456; (1965) 1 All ER 21.

issue: The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.”⁴⁴
(emphasis supplied)

Yet as held by the Supreme Court in the case of *Bareilly Electricity Co. v. Workmen*⁴⁵, this does not mean that administrative tribunals can decide a matter without any evidence on record or can act upon what is not evidence in the eye of law or on a document not proved to be a genuine one.

Speaking for the Court, Reddy, J. observed: “[I]t is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witness who have executed them, if they are alive and can be produced.”⁴⁶ (emphasis supplied)

11. REASONS FOR DECISIONS

Recording of reasons in support of the order is considered to be a part of natural justice, and every quasi-judicial authority including an administrative tribunal is bound to record reasons in support of the orders passed by it.

In the leading case of *M.P. Industries v. Union of India*⁴⁷, Subba Rao, J. (as he then was) observed:

“In the context of a welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimise arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimises arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A *reasoned order is a desirable condition of judicial disposal.*”⁴⁸

(emphasis supplied)

44. *Id.* at p. 488 (QB). See also *Miller v. Minister of Housing*, (1968) 1 WLR 992: (1968) 2 All ER 663.

45. (1971) 2 SCC 617: AIR 1972 SC 330.

46. *Id.* at p. 629 (SCC): pp. 339-40 (AIR).

47. AIR 1966 SC 671: (1966) 1 SCR 466.

48. *Id.* at p. 677 (AIR).

Dealing with the contention regarding disposal of matters even by Crown's Courts *in limine* without recording reasons, His Lordship rightly observed: "It is said that this principle is not uniformly followed by appellate Courts, for appeals and revisions are dismissed by appellate and revisional Courts *in limine* without giving any reasons. There is an essential distinction between a Court and an administrative tribunal. A Judge is trained to look at things objectively, uninfluenced by considerations of policy or expediency; but, an executive officer generally looks at things from the stand-point of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing of orders affecting the rights of parties; and the least they should do is to give reasons for their orders."⁴⁹ (emphasis supplied)

12. FINALITY OF DECISIONS

In many statutes, provisions are made for filing appeals or revisions against the orders passed by administrative tribunals and statutory authorities. For example, under the Bombay Industrial Relations Act, 1946, an appeal can be filed before the Industrial Tribunal against the order passed by the Labour Court; or to the Rent Control Tribunal against the order passed by the Rent Controller under the Delhi Rent Control Act, 1958 or to the Income Tax Tribunal against the order passed by the Appellate Assistant Commissioner, Inspecting Assistant Commissioner or Commissioner under the Income Tax Act, 1961.

Sometimes, however, provisions are made in a statute by which the orders passed by administrative tribunals and other authorities are made 'final'. This is known as 'statutory finality' and it may be of two types—

- (i) sometimes no provision is made for filing any appeal, revision or reference to any higher authority against the order passed by an administrative tribunal or authority; or
- (ii) sometimes an order passed by administrative authorities or tribunals are *expressly* made final and jurisdiction of civil courts is also ousted.

Regarding the first type of 'finality', there cannot be any objection, as no one has an inherent right of appeal. A right to file an appeal is a statutory right and if the statute does not confer the right on any party and treats the decision of the lower authority as final, no appeal can be filed against that decision. Thus, under the Income Tax Act, 1961, the

49. *Id.* at p. 675 (AIR).

decision given by the Income Tax Appellate Tribunal on a question of fact is made final and no appeal lies against that finding to any authority. In the same manner, under the Administration of Evacuee Property Act, 1951, the order passed by the Custodian of Evacuee Property is made final and no appeal or revision lies to any authority against the said decision.

Regarding the second type of finality, provisions are made in some statutes by which the decisions recorded by administrative tribunals are *expressly* made final and jurisdiction of civil courts is also ousted. And even though the subject-matter of the dispute may be of a civil nature and, therefore, covered by Section 9 of the Code of Civil Procedure, 1908, a civil suit is barred by the statutory provision. For example, Section 170 of the Representation of the People Act, 1951 provides:

“No civil court shall have jurisdiction to question the legality of any action taken or any decision given by the returning officer or by any other person appointed under this Act in connection with an election.”

In these cases, the correct legal position is that the jurisdiction of civil courts must be ousted either expressly or by necessary implication. Even if the jurisdiction of civil courts is ousted, they have jurisdiction to examine the cases where the provisions of the Act and the rules made thereunder have not been complied with and the order passed by the tribunal is *de hors* the Act or ‘purported order’⁵⁰ or the statutory authority has not acted in conformity with the fundamental principles of natural justice,⁵¹ or the decision is based on ‘no evidence’,⁵² etc. as in these cases, the order cannot be said to be ‘under the Act’⁵³ and the jurisdiction of the civil court is not ousted.

In *Radha Kishan v. Ludhiana Municipal Council*⁵⁴, the Supreme Court observed: “Under Section 9 of the Code of Civil Procedure the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute,

50. *Union of India v. Tarachand Gupta*, (1971) 1 SCC 486: AIR 1971 SC 1558.

51. *Srinivasa v. State of A.P.*, (1969) 3 SCC 711: AIR 1971 SC 71; *Dhulabhai v. State*, AIR 1969 SC 78: (1968) 3 SCR 662; *Dhrangadhra Chemical Works v. State of Saurashtra*, AIR 1957 SC 264: 1957 SCR 152.

52. *Kaushalya Devi v. Bachittar Singh*, AIR 1960 SC 1168; *Bhatnagar & Co. v. Union of India*, AIR 1957 SC 478: 1957 SCR 701; *Board of High School v. Bagleshwar Prasad*, AIR 1966 SC 875: (1963) 3 SCR 367; *Jagrutiben v. Gujarat Secondary Education Board*, AIR 1992 Guj 45.

53. *Dhulabhai v. State*, (infra); *Union of India v. Tarachand Gupta*, (supra); *Premier Automobiles v. Wadke*, (1976) 1 SCC 496: AIR 1975 SC 2238.

54. AIR 1963 SC 1547 (1551): (1964) 2 SCR 273.

therefore, expressly or by necessary implication can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. *A suit in a civil court will always lie to question the order of a tribunal created by statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.*"

(emphasis supplied)

Suffice it to say that in the classic decision of *Dhulabhai v. State*⁵⁵, after discussing the case-law exhaustively, Hidayatullah, C.J. summarised the following principles in this regard:

- (1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
- (2) Where there is an express bar of jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

55. AIR 1969 SC 78: (1968) 3 SCR 662.

- (3) Challenge to the provisions of the particular Act as *ultra vires* cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.
- (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of *certiorari* may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act, but it is not a compulsory remedy to replace a suit.
- (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or is illegally collected a suit lies.
- (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant inquiry.
- (7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.⁵⁶

13. DECISIONS OF TRIBUNALS AND JUDICIAL REVIEW

As discussed above, no appeal, revision or reference against the decision of an administrative tribunal is maintainable if the said right is not conferred by the relevant statute. Provisions can also be made for ouster of jurisdiction of civil courts; and in all these cases the decisions rendered by the tribunal will be treated as '*final*'. But this statutory finality will not affect the jurisdiction of High Courts under Articles 226 and 227 and of the Supreme Court under Articles 32 and 136 of the Constitution of India.⁵⁷ The power of judicial review of High Courts and the Supreme Court is recognised by the Constitution and the same cannot be taken away by any statute; and if the tribunal has acted without jurisdiction, or has failed to exercise jurisdiction vested in it, or if the order passed by the tribunal is arbitrary, perverse or *mala fide*, or it has not observed the principles of natural justice, or there is an error apparent on the face of the record, or the order is *ultra vires* the Act, or there is no evidence in support of the order, or the order is based on irrelevant

56. *Id.* at pp. 89-90 (AIR): 682-84 (SCR); see also *Premier Automobiles v. Wadke* (1976) 1 SCC 496; AIR 1975 SC 2238. For detailed discussion regarding the jurisdiction of civil courts, see C.K. Takwani: *Civil Procedure*, 1997, pp. 27-42.

57. See also Lecture IX (*infra*).

considerations, or where the findings recorded are conflicting and inconsistent, or grave injustice is perpetuated by the order passed by the tribunal or the order is such that no reasonable man would have made it, the same can be set aside by the High Court or by the Supreme Court. It is appropriate at this stage to quote the following observations of Denning, L.J.⁵⁸:

“If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.”

At the same time, it must be borne in mind that the powers of High Courts and the Supreme Court under the Constitution of India are extremely limited and they will be reluctant to interfere with or disturb the decisions of specially constituted authorities and tribunals under a statute on the ground that the evidence was inadequate or insufficient, or that detailed reasons were not given. The Supreme Court and High Courts are not courts of appeal and revision over the decisions of administrative tribunals.⁵⁹

14. REVIEW OF DECISIONS

There is no inherent power of review with any authority and the said power can be exercised only if it is conferred by the relevant statute.⁶⁰ As a general rule, an administrative tribunal becomes *functus officio* (ceases to have control over the matter) as soon as it makes an order and thereafter cannot review its decision unless the said power is conferred on it by a statute, and the decision must stand unless and until it is set aside by appellate or revisional authority or by a competent court.

Again, review is not a re-hearing of the matter on merits. Maybe, the court might not be right in refusing relief in the ‘first round’, but when once the order is passed by the court, a review thereof ‘must be

58. *R. v. Medical Appeal Tribunal*, (1957) 1 QB 574 (586); (1957) 1 All ER 796 (801).

59. *State of A.P. v. C.V. Rao*, (1975) 2 SCC 557; AIR 1975 SC 2151; *Sri Ram Vilas Service v. Chandrasekaran*, AIR 1965 SC 107; (1964) 5 SCR 869; *Bombay Union of Journalists v. State of Bombay*, AIR 1964 SC 1617; (1964) 6 SCR 22; *Hindustan Tin Works v. Employees*, (1979) 2 SCC 80; AIR 1979 SC 75; *Prem Kakar v. State*, (1976) 3 SCC 433; AIR 1976 SC 1474; *Union of India v. Parma Nanda*, (1989) 2 SCC 177; AIR 1989 SC 1185; see also Lecture IX (*infra*).

60. *Patel Narshi Thakershi v. Pradumansinghi*, (1971) 3 SCC 844; AIR 1970 SC 1273; *Mehar Singh v. Naunihal*, (1973) 3 SCC 731; AIR 1972 SC 2533; *Chandra Bhan v. Latafat Ullah*, (1979) 1 SCC 321; AIR 1979 SC 1814; *R.R. Verma v. Union of India*, (1980) 3 SCC 402; AIR 1980 SC 1461; for detailed discussion about ‘Review’, see C.K. Takwani: *Civil Procedure*, 1997, 323-31.

subject to the rules of the same and cannot be lightly entertained'. "A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost."⁶¹

In the leading case of *Northern India Caterers Ltd. v. Lt.-Governor of Delhi*⁶², Pathak, J. (as he then was) rightly observed: "Whatever the nature of the proceedings, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered *except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.*"

(emphasis supplied)

This, however, does not mean that in absence of any statutory provision an administrative tribunal is powerless. An administrative tribunal possesses those powers which are inherent in every judicial tribunal. Thus, it can reopen *ex parte* proceedings, if the decision is arrived at without issuing notice to the party affected; or on the ground that it had committed a mistake in overlooking the change in the law which had taken place before passing the order; or to prevent miscarriage of justice; or to correct grave and palpable errors committed by it; or what the principles of natural justice required it to do.⁶³

It is submitted that the following observations of Chinnappa Reddy, J. in *A.T. Sharma v. A.P. Sharma*⁶⁴ lay down correct law on the point. After referring to the well-known decision in *Shivdeo Singh*⁶⁴, His Lordship observed:

61. *Chandra Kanta v. Sk. Habib*, (1975) 1 SCC 674 : AIR 1975 SC 1500 (per Krishna Iyer, J.).

62. (1980) 2 SCC 167 (172): AIR 1980 SC 674 (678).

63. *Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909 (1911).

64. (1979) 4 SCC 389 (391): AIR 1979 SC 1047 (1048).

“[T]here is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definite limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. *A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court.*” (emphasis supplied)

15. DOCTRINE OF RES JUDICATA

The doctrine of *res judicata* is embodied in Section 11 of the Code of Civil Procedure, 1908. It means that if an issue had been made the subject-matter of the previous suit and had been raised, tried and decided by a competent court having jurisdiction to try the suit, the same issue cannot thereafter be raised, tried or decided by any court between the same parties in a subsequent suit.

Though Section 11 of the Code speaks about civil suits only, the general principles underlying the doctrine of *res judicata* applies even to administrative adjudication. Thus, an award pronounced by the Industrial Tribunal operates as *res judicata* between the same parties and the Payment of Wages Authority has no jurisdiction to entertain the said question again,⁶⁵ or if in an earlier case, the Labour Court had decided that A was not a ‘workman’ within the meaning of the Industrial Disputes Act, 1947, it operates as *res judicata* in subsequent proceedings.⁶⁶ In *Bombay Gas Co. v. Jagannath Pandurang*⁶⁷, the Supreme Court observed: “*The doctrine of res judicata is a wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations.* It proceeds on the principle that there should be no unnecessary litigation and whatever claims and

65. *Bombay Gas Co. v. Shridhar*, AIR 1961 SC 1196 : (1961) 2 LLJ 629.

66. *Bombay Gas Co. v. Jagannath Pandurang*, (1975) 4 SCC 690 : (1975) 2 LLJ 345.

67. (1975) 4 SCC 690 (695): (1975) 2 LLJ 345.

defences are open to parties should all be put forward at the same time provided no confusion is likely to arise by so putting forward all such claims.” (emphasis supplied)

About a year later,⁶⁸ the Supreme Court entertained ‘doubt’ about the extension of the sophisticated doctrine of constructive *res judicata* to industrial law.

It is, however, submitted that the view taken by Gajendragadkar, J. (as he then was) in the case of *Trichinopoly Mills v. Workers’ Union*⁶⁹ is correct. In that case, His Lordship observed:

“It is not denied that the principles of *res judicata* cannot be strictly involved in the decisions of such points though it is equally true that industrial tribunals would not be justified in changing the amounts of rehabilitation from year to year without sufficient cause.”

16. ADMINISTRATIVE TRIBUNALS: WHETHER BOUND BY DECISIONS OF SUPREME COURT AND HIGH COURTS ?

Article 141 of the Constitution declares that “the law declared by the Supreme Court shall be binding on all courts within the territory of India”. Undoubtedly, the scope of Article 141 is very wide and it would apply to ordinary courts as well as administrative tribunals.

There is no provision corresponding to Article 141 with respect to the law declared by a High Court. The question, therefore, arises whether the law declared by a High Court has a similar binding effect over all subordinate courts and inferior tribunals within the territories in relation to which it exercises jurisdiction.

Generally, even in the absence of specific provisions, the same principle applies to judgments of a High Court. Again, as the Supreme Court is the apex Court in the country, the High Court is the apex Court in the State. Moreover, like the Supreme Court, the High Court, over and above writ jurisdiction, has also supervisory jurisdiction over all subordinate courts and inferior tribunals within the territories in relation to which it exercises its jurisdiction. Therefore, if any administrative tribunal acts without jurisdiction, exceeds its power or seeks to transgress the law laid down by the High Court, the High Court can certainly interfere with the action of the tribunal.

68. *Mumbai Kamgar Sabha v. Abdulbhai*, (1976) 3 SCC 832 : AIR 1976 SC 1455.

69. AIR 1960 SC 1003 (1004); (1960) 2 LLJ 46; for income tax matters see *Maharana Mill v. ITO*, AIR 1959 SC 881; *Visheshwara Singh v. ITC*, AIR 1961 SC 1062; *Udayan Chinubhai v. CIT*, AIR 1967 SC 762; for detailed discussion about ‘Res Judicata’ see C.K. Takwani: *Civil Procedure*, 1997, pp. 45-80.

This question directly arose before the Supreme Court in the case of *East India Commercial Co. Ltd. v. Collector of Customs*⁷⁰. In that case, proceedings had been initiated by the Collector of Customs against the petitioner company on the allegations that it had violated the conditions of licence and illegally disposed of goods and thereby committed an offence. The High Court confirmed the order of acquittal passed by the trial court holding that it cannot be said that "a condition of the licence amounted to an order under the Act" and, therefore, no offence was committed by the company. The High Court also passed an order directing the seized goods to be sold and the sale proceeds to be deposited in the court. After those proceedings, a notice was issued by the Collector on the company to show cause why the amount should not be confiscated and the penalty should not be imposed. It was contended by the company that when once the High Court had decided that the breach of a condition of the licence cannot be said to be a breach of order, the Collector had no jurisdiction to issue the show-cause notice. It was submitted that the decision of a High Court on a point is binding on all subordinate courts and inferior tribunals within its territorial jurisdiction and the notice was, therefore, required to be quashed. Upholding the contention and quashing the show-cause notice, the majority rightly observed: "This raises the question whether an administrative tribunal can ignore the law declared by the highest court in the State and initiate proceedings in direct violation of the law so declared.... Under Article 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on all subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working, otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer.

The Court added:

We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superin-

70. AIR 1962 SC 1893; (1963) 3 SCR 338.

tendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such proceeding."⁷¹

(emphasis supplied)

Where the tribunal notices a decision of the Supreme Court and tries to distinguish it without distinguishing features, the approach is highly objectionable.⁷² A deliberate attempt to flout a judgment of a superior court may amount to contempt of court.⁷³

17. ADMINISTRATIVE TRIBUNALS AND DOCTRINE OF PRECEDENT

Administrative tribunals are bound by the decisions of the Supreme Court and of the High Court in the territories within which they exercise jurisdiction. But over and above the Supreme Court and the High Court, every tribunal is bound by a decision of a higher authority also.

In *Bhopal Sugar Industries v. I.T.O.*,⁷⁴ the Income Tax Officer refused to carry out clear and unambiguous directions issued by Income Tax Tribunal. Observing that such refusal would be against the fundamental principle of hierarchy of courts, the Supreme Court stated, "*Such a view is destructive of the basic principles of the administration of justice.*" (emphasis supplied)

In another case,⁷⁵ the Supreme Court stated, "In a tier system undoubtedly decisions of higher authorities are binding on lower authorities *and quasi-judicial tribunals are also bound by this principle.*" (emphasis supplied). There must be restraint at all levels as otherwise there can be no rule of law and our entire system of administration of justice will fail.⁷⁶

Again, in *Ajit Babu v. Union of India*,⁷⁷ the Supreme Court held that the doctrine of precedent applies even to Central Administrative Tribunals. Whenever a point of law is decided by a judgment of the tribunal, it has to take into account the said decision rendered in earlier case as a precedent and decide the case accordingly.

71. AIR 1962 SC 1893 at 1905 (per Subba Rao, J.). See also *Padmanabha Setty v. Papiiah Setty*, AIR 1966 SC 1824: (1966) 2 SCR 190; *Kaushalya Devi v. Land Acquisition Officer, Aurangabad*, (1984) 2 SCC 324: AIR 1984 SC 892; *Bishnu v. Parag*, (1984) 2 SCC 488: AIR 1984 SC 898; *Jain Exports v. Union of India*, (1988) 3 SCC 579; *State of Orissa v. Bhagaban Sarangi*, (1995) 1 SCC 399; *Cassel & Co. v. Broome*, (1972) 1 All ER 801: (1972) 2 WLR 645: AIR 1995 SC 1349.

72. *Union of India v. Kantilal*, (1995) 3 SCC 17: AIR 1995 SC 1349.

73. *Bardakanta v. Bhimsen*, (1973) 1 SCC 446: AIR 1972 SC 2466.

74. AIR 1961 SC 182 (185): (1961) 1 SCR 474.

75. *Jain Exports v. Union of India*, (1988) 3 SCC 579 (585).

76. *Bishnu Ram v. Parag Saikia*, (1984) 2 SCC 488 (500): AIR 1984 SC 898; *Kaushalya Devi v. L.A.O.*, (1984) 2 SCC 324: AIR 1984 SC 892.

77. AIR 1997 SC 3277.

It is submitted that the following observations of Lord Chancellor in *Cassell v. Broome*⁷⁸ lay down correct law on the point and, therefore, are worth quoting:

"It is inevitable in a hierarchical system of courts that there are decisions of the Supreme Appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal, I sometimes thought the House of Lords was wrong in overruling me. Ever since that time there have been occasions, of which the instant appeal is one, when alone or in company, I have dissented from a decision of the majority of this House. But *the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.*"

(emphasis supplied)

18. DOCTRINE OF STARE DECISIS

The doctrine of stare decisis applied to Crown's Courts does not *stricto sensu* apply to administrative tribunals. The duty of such tribunals is 'to reach the right decision in the circumstances of the moment' and they are not bound to follow previous decisions. This, however, does not mean that administrative tribunals need not exercise discretion on the basis of reasonable or consistent principles or that no regard may be had to previous decisions. It is desirable that the principles followed by tribunals should be known to public at large and on the basis of such principles cases are decided.⁷⁹

In *Union of India v. Paras Laminates*,⁸⁰ a Bench of two members of CEGAT [Customs, Excise and Gold (Control) Appellate Tribunal] disagreed with the view taken by another Bench on an identical question of law and referred the matter to a larger Bench. Upholding the action of the tribunal, the Supreme Court stated: "The rationale of this rule is the need for continuity, certainty and predictability in the administration of justice. Persons affected by decisions of Tribunals or courts have a right to expect that those exercising judicial functions will follow the reason of ground of the judicial decision in the earlier cases on identical matters. . . . It is, however, equally true that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light what is perceived by them as an er-

78. (1972) 1 All ER 801 (809); (1972) 2 WLR 645.

79. Wade: *Administrative Law*, (1994), pp. 628-29, 935.

80. (1990) 4 SCC 453 (457-58); AIR 1991 SC 696. See also observations of Lord Denning in *HTV Ltd. v. Price Commission*, 1976 ICR 170.

roneous decision in the earlier case. *In such circumstances, it is but natural and reasonable and indeed efficacious that the case is referred to a larger bench.* (emphasis supplied)

19. CONTEMPT OF ADMINISTRATIVE TRIBUNALS

Articles 129 and 215 of the Constitution preserve all the powers of the Supreme Court and the High Courts, respectively, as a Court of Record which include the power to punish the contempt for itself. Section 10 of the Contempt of Courts Act, 1971 empowers every High Court to exercise the same jurisdiction, power and authority in respect of contempt of courts subordinate to it as it exercises in respect of contempt of itself.⁸¹

Thus, there is no controversy that a High Court can deal with the case of contempt of a court subordinate to it. The question, however, is whether a "tribunal" can be said to be a "court" subordinate to the High Court.

In some cases, the Supreme Court held that the phrase "court subordinate to a High Court" under the Contempt of Courts Act is wide enough to include administrative tribunals throughout the territories in relation to which the High Court exercises jurisdiction under Article 227 of the Constitution, whereas in some other cases, it has taken a contrary view.

A direct question arose before the Supreme Court in *Brajnandan Sinha v. Jyoti Narain*⁸². In that case, the High Court of Patna convicted *B* under the Contempt of Courts Act, 1952 holding that the Commissioner appointed under the Public Servants (Inquiries) Act, 1850 was a "court subordinate to the High Court". *B* approached the Supreme Court.

It was contended that the Commissioner could not be said to be "court" within the meaning of the Contempt of Courts Act. In any case, he was not a "court subordinate to the High Court" merely because his orders were subject to supervisory jurisdiction of the High Court under Article 227 of the Constitution.

Interpreting the provisions of the Act and referring to various decisions, the Supreme Court held that the Commissioner cannot be said to be a "Court" as understood in the Contempt of Courts Act. The Court stated. "*The expression 'Courts subordinate to the High Courts' would prima facie mean the Courts of law subordinate to the High Courts in the hierarchy of courts established for the purpose of administration of justice throughout the Union.*"⁸³ (emphasis supplied)

81. *S.K. Sarkar, Member, Board of Revenue v. V.C. Misra*, (1981) 1 SCC 436; AIR 1981 SC 723; (1981) 2 SCR 331; *Mohd. Ikram v. State of U.P.*, AIR 1964 SC 1625; (1964) 5 SCR 86.

82. AIR 1956 SC 66; (1955) 2 SCR 955.

83. *Id.* at p. 69 (AIR).

In the opinion of the Court, 'unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be predicted that he or they constitute a court'. As the Commissioner was a mere fact-finding authority and his report lacked both finality and authoritativeness which were essential tests of a judicial pronouncement, he could not be said to be a Court.

In *Jugal Kishore v. Sitamarhi Central Coop. Bank*⁸⁴, the Assistant Registrar exercising powers under the Co-operative Societies Act and deciding disputes between the society and members was held to be "Court". The Registrar was not merely the trappings of a Court but in many respects he is given the same powers as are given to ordinary civil courts.'

Again, in *S.K. Sarkar, Member, Board of Revenue v. V. C. Misra*,⁸⁵ the Court of Board of Revenue was held to be a Court subordinate to the High Court. The Supreme Court held that the expression 'Courts subordinate to the High Court' was wide enough to include all courts which were judicially subordinate to the High Court under Article 227 of the Constitution even though administrative control over them did not vest in the High Court under Article 235 of the Constitution.

But in *Alahar Coop. Credit Service Society v. Sham Lal*⁸⁶, without referring to earlier decisions, the Supreme Court held that a Labour Court established under the Industrial Disputes Act, 1947 could not be said to be a Court subordinate to the High Court and no contempt proceedings for non-compliance of the award passed by the Labour Court would lie.

Certain tribunals have been conferred power by their parent statutes to punish a person for committing their contempt. In such cases, a tribunal can exercise powers under the Contempt of Courts Act, 1971.⁸⁷

20. FRANKS COMMITTEE

In 1955, a Committee was appointed by the Lord Chancellor under the Chairmanship of Sir Oliver Frank to consider and make recommendations of the constitution and working of administrative tribunals in England. Various complaints had been made by people against the working of administrative tribunals to Franks Committee. Those complaints were:

84. AIR 1967 SC 1494 (1499): (1967) 3 SCR 163.

85. (1981) 1 SCC 436: AIR 1981 SC 723: (1981) 2 SCR 331. See also *Mohd. v. Chandrabhanu*, AIR 1986 Guj 210: (1986) 27 Guj LR 1 (FB).

86. (1995) 2 Guj LH 550 (SC).

87. S. 17, Administrative Tribunals Act, 1985.

- (1) Sometimes, there is no appeal against the tribunal's decision, e.g. Rent Tribunal. Tremendous power, which can ruin a person's life, has been put into the hands of three men. Yet there is no higher court in which their decisions can be tested.
- (2) The three on the Bench of the tribunal need have no proper legal qualifications. A court of no appeal has been put into the hands of men who are generally neither qualified lawyers, Magistrates nor Judges.
- (3) There is no evidence on oath, and therefore there can be no proper cross-examination as in a court of law. Statements are made on both sides, but the time-honoured method of getting to the truth cannot be used.
- (4) Procedure is as the tribunal shall determine. No rules have been laid down as to the procedure at a tribunal hearing. Witnesses may be heard or not heard at their pleasure.⁸⁸

Though the aforesaid complaints were against the Rent Tribunals, they were present in all tribunals.

The Committee submitted its report in 1957 and made the following recommendations:⁸⁹

- (1) Chairmen of tribunals should be appointed and removed by the Lord Chancellor; members should be appointed by the Council and removed by the Lord Chancellor.
- (2) Chairmen should ordinarily have legal qualifications and always in the case of appellate tribunals.
- (3) Remuneration for service on tribunals should be reviewed by the Council on Tribunals.
- (4) Procedure for each tribunal, based on common principles but suited to its needs, should be formulated by the Council.
- (5) The citizen should be helped to know in good time the case he will have to meet.
- (6) Hearings should be in public, except only in cases involving (i) public security, (ii) intimate personal or financial circumstances, or (iii) professional reputation, where there is a preliminary investigation.
- (7) Legal representation should always be allowed, save only in most exceptional circumstances. In the case of national insurance

88. Wade: *Administrative Law*, 1994, p. 919.

89. Wade: *Administrative Law*, 1994, pp. 923-24.

tribunals the Committee was content to make legal representation subject to the Chairman's consent.

- (8) Tribunals should have power to take evidence on oath, to subpoena witnesses, and to award costs. Parties should be free to question witnesses directly.
- (9) Decisions should be reasoned, as full as possible, and made available to the parties in writing. Final appellate tribunals should publish and circulate selected decisions.
- (10) There should be a right of appeal on fact, law and merits to an appellate tribunal, except where the lower tribunal is exceptionally strong.
- (11) There should also be an appeal on a point of law to the courts; and judicial control by the remedies of *certiorari*, prohibition and *mandamus* should never be barred by statute.
- (12) The Council should advise, and report quickly, on the application of all these principles to the various tribunals, and should advise on any proposal to establish a new tribunal.

Griffith and Street⁹⁰ have included:

- (13) Adjudications of law and fact in which no policy question is involved should not be carried out by Ministers themselves or by Civil Servants in the Minister's name.
- (14) The personnel of tribunals deciding issues of law or fact or applying standards should be independent of the departments with which their functions are connected.
- (15) The personnel should enjoy security of tenure and adequacy of remuneration essential to the proper discharge of their duties.
- (16) At least one member of the tribunal should be a lawyer if the questions of fact and law arise; one member may have expert knowledge where such knowledge would be helpful to guide discretion and apply standards.
- (17) An appellate system should be provided so that those aggrieved by an adjudication may go to a higher tribunal and ultimately matters of law should reach the court.

21. CONSTITUTION (42ND AMENDMENT ACT): EFFECT

By the Constitution (42nd Amendment) Act, 1976, Part XIV-A came to be inserted. Articles 323-A and 323-B enabled Parliament to constitute administrative tribunals for dealing with certain disputes. Article 323-A

90. *Principles of Administrative Law*, 1963, p. 193.

enacts that Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints concerning recruitment and conditions of service of persons appointed to the public service. Parliament may by law specify the jurisdiction, power and authority of such tribunals and prescribe the procedure to be followed by them. Article 323-B(1) empowers the appropriate legislature to provide for the adjudication or trial by tribunals of any disputes, complaints or offences with respect to all or any of the matters specified in clause (2). Such a law may also provide for the exclusion of jurisdiction of all courts except that of the Supreme Court under Article 136.

Part XIV-A inserted by the 42nd amendment opened a new chapter in the Indian Constitutional and Administrative Law, substantially excluding and curtailing judicial review of administrative action. It was a 'retrograde innovation'⁹¹ and its object was to take away the supervisory jurisdiction of the High Court over tribunals under Article 227. However, Articles 323-A and 323-B were not self-executory inasmuch as they themselves did not take away the jurisdiction of High Courts under Article 226 or Article 227 of the Constitution, but they only enabled Parliament or the appropriate legislature to make laws to set up such tribunals and to exclude the jurisdiction of the High Courts under Article 226 or Article 227.

(It is, however, submitted that the above legal position has now been substantially changed in view of a recent decision of the Supreme Court in *L. Chandra Kumar v. Union of India*.⁹²)

22. SAMPATH KUMAR V. UNION OF INDIA

In exercise of the power conferred by Article 323-A of the Constitution, Parliament enacted the Administrative Tribunals Act, 1985. Section 28 of the Act excluded the power of judicial review exercised by the High Courts in service matters under Articles 226 and 227. However, it has not excluded the judicial review entirely inasmuch as the jurisdiction of the Supreme Court under Articles 32 and 136 of the Constitution was kept intact. The constitutional validity of the Act was challenged before the Supreme Court in the leading case of *S.P. Sampath Kumar v. Union of India*⁹³. Undoubtedly, the question raised was of far reaching effect and of great public importance.

91. M.P. Jain: *Indian Constitutional Law*, 1993, p. 918.

92. (1997) 3 SCC 261: AIR 1997 SC 1125. For detailed discussion, see *L. Chandra Kumar v. Union of India*, (infra).

93. (1987) 1 SCC 124: AIR 1987 SC 386.

The Constitution Bench upheld the validity of the Administrative Tribunals Act, 1985. Speaking for the majority, Ranganath Misra, J. (as he then was) observed: "We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification. Thus, exclusion of the jurisdiction of the High Court does not *totally* bar judicial review.... It is possible to set up an alternative institution in place of the High Court for providing judicial review.... The Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice.... What, however, has to be kept in view is that the Tribunal should be a real substitute for the High Court not only in form and *de jure* but in content and *de facto*.... Under Sections 14 and 15 of the Act all the powers of the Court in regard to matters specified therein vest in the Tribunal — either Central or State. Thus, *the Tribunal is the substitute of the High Court and is entitled to exercise the powers thereof.*"⁹⁴

(emphasis supplied)

In concurring judgment, Bhagwati, C.J. rightly observed: "If this constitutional amendment were to permit a law made under clause (1) of Article 323-A to exclude the jurisdiction of the High Courts under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent power of Parliament. It must, therefore, be read as implicit in this constitutional amendment that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it must not leave a void but it must set up another *effective* institutional mechanism or authority and vest the power of judicial review in it. *Consequently, the impugned Act excluding the jurisdiction of the High Court under Articles 226 and 227 in respect of service matters and vesting such jurisdiction in the Administrative Tribunal can pass the test of constitutionality as being within the ambit and coverage of clause (2)(d) of Article 323-A, only if it can be shown that the Administrative Tribunal set up under the impugned Act is equally efficacious as the High Court, so far as the power of judicial review over service matters is concerned.*"⁹⁵

(emphasis supplied)

94. *Id.* at pp. 138-39 (SCC); 395-96 (AIR).

95. (1987) 1 SCC 124 at 130-31; 389-90 (AIR).

In *J.B. Chopra v. Union of India*⁹⁶, the Supreme Court held that the Administrative Tribunal has jurisdiction, power and authority to decide even the constitutional validity or otherwise of any statute, statutory rule, regulation or notification.

23. POST SAMPATH KUMAR POSITION

In *Sampath Kumar*,⁹⁷ the Supreme Court upheld the validity of the Administrative Tribunals Act, 1985 by observing that Central Administrative Tribunals were "real substitutes" of High Courts *de jure* (in form) as well as *de facto* (in content) in regard to the matters to be dealt with by them and no void had been created.

While upholding the validity of the Act, the Constitution Bench considered faith of litigants in High Courts and the role played by them in the administration of justice. Speaking for the majority, Misra, J. (as he then was) also impressed upon Administrative Tribunals by observing:

"The High Courts have been functioning for over a century and a quarter and until the Federal Court was established under the Government of India Act, 1935, used to be the highest courts within their respective jurisdictions subject to an appeal to the Privy Council in a limited category of cases. In this long period of about six scores of years, the High Courts have played their role effectively, efficiently and also satisfactorily. The litigant in this country has seasoned himself to look up to the High Courts as the unfailing protector of his person, property and honour. The institution has served its purpose very well and the common man has thus come to repose great confidence therein. Disciplined, independent and trained judges well versed in law and working with all openness in an unattached and objective manner have ensured dispensation of justice over the years. Aggrieved people approach the court — the social mechanism to act as the arbiter — not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the court. *It is, therefore, of paramount importance that the substitute institution—the Tribunal— must be a worthy successor of the High Court in all respects.*"⁹⁸

(emphasis supplied)

96. (1987) 1 SCC 422; AIR 1987 SC 357; see also *Amulya Chandra v. Union of India*, (1991) 1 SCC 181; *R.K. Jain v. Union of India*, (1993) 4 SCC 119; *Chief Adjudication Officer v. Foster*, (1993) AC 754.

97. *Sampath Kumar v. Union of India*, (1987) 1 SCC 124; AIR 1987 SC 386; (1987) 1 SCR 435.

98. *Id.* at p. 139 (SCC); 396 (AIR).

The question, however, was: whether it was true? Were administrative Tribunals really substitutes of High Courts? Did they fulfil the objects for which they had been set up? Actual experience and functioning of tribunals, unfortunately, was far from satisfactory. They lacked in competence, objectivity and judicial approach. They failed to inspire confidence in public mind and were not successful in creating an "effective alternative institutional mechanism" as intended while inserting Article 323-A in the Constitution. There were serious complaints against such tribunals. They did not allow to argue cases properly. Some tribunals did not permit oral submissions. Some others did not allow even the Supreme Court decisions to be cited. Many a time, such tribunals had become "resting place for those who had outlived their utility" and had become "dead wood".

The Arrears Committee, after in-depth study of all these problems, stated:

"The overall picture regarding tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before experiment is extended to new areas of the fields, especially if the constitutional jurisdiction of the High Court is to be simultaneously ousted."¹

In *R.K. Jain v. Union of India*,² the Supreme Court expressed anguish on working of 'alternative institutional mechanisms' and their ineffectiveness in exercising the high power of judicial review. It was also noted that the sole remedy provided under Article 136 of the Constitution was ineffective and inconvenient and a suggestion was made that an expert body like the Law Commission should study the feasibility of providing an appeal to a Bench of two Judges of the High Court concerned from the orders of such tribunals.

24. CHANDRA KUMAR V. UNION OF INDIA³

In *Chandra Kumar v. Union of India*,⁴ a Division Bench of the Supreme Court expressed the view that the decision rendered by a Constitution Bench of five Judges in *Sampath Kumar*⁵ needed to be "comprehensively reconsidered", and a "fresh look by a larger Bench

1. Report of Arrears Committee, (1989-90), Vol. II, Chapters VIII, IX; pp. 110-11; para 8-65.

2. (1993) 4 SCC 119.

3. (1997) 3 SCC 261; AIR 1997 SC 1125.

4. (1995) 1 SCC 400.

5. *Sampath Kumar v. Union of India*, (1987) 1 SCC 124; AIR 1987 SC 386; (1987) 1 SCR 435.

over all the issues adjudicated in *Sampath Kumar*'' was necessary. In the light of the opinion of the Division Bench, the matter was placed before a larger Bench of seven Judges.

After considering various decisions on the point, the larger Bench held that the power of judicial review is a basic and essential feature of the Constitution and the jurisdiction conferred on High Courts under Articles 226 and 227 and on the Supreme Court under Article 32 of the Constitution is a part of basic structure of the Constitution. For securing independence of judiciary, the judges of superior courts have been entrusted with the power of judicial review. Though Parliament is empowered to amend the Constitution, that power cannot be exercised so as to damage the essential feature of the Constitution or to destroy its basic structure.

The Court also observed that High Courts and the Supreme Court have been entrusted with the task of upholding the Constitution and with a view to achieving that end, they have to interpret the Constitution. It is the power and duty of judiciary to ensure that the legislature and the executive do not, in discharge of their functions, transgress constitutional limitations. The said power, therefore, cannot be ousted or excluded by an Act of Parliament or even by affecting amendment in the Constitution.

In the light of various decisions of the Court, the larger Bench held that not only Section 28 of the Administrative Tribunals Act, 1985 was *ultra vires*, but clause 2(d) of Article 323-A and clause 3(d) of Article 323-B as amended by the Constitution (42nd Amendment) Act, 1976 were also *ultra vires* and unconstitutional as they destroyed the basic structure of the Constitution. The Court held that there was no constitutional prohibition against administrative tribunals in performing a supplemental as opposed to a substitutional role. In exercising powers such tribunals cannot act as substitutes for High Courts and the Supreme Court. Their decisions will be subject to scrutiny by a Division Bench of the respective High Courts.

In concluding remarks, the Court speaking through Ahmadi, C.J. declared;

''In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the ''exclusion of jurisdiction'' clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent be unconstitutional. *The*

jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution."⁶ (emphasis supplied).

It is submitted that the view taken by the Supreme Court in *Chandra Kumar* lays down correct law on the point. *Sampath Kumar* did not consider all aspects in their proper perspective. The attention of the Court was also not specifically invited to the exclusion of jurisdiction of the Supreme Court under Article 32 of the Constitution, as also unsatisfactory working of various Tribunals, obviously because it was a subsequent event post *Sampath Kumar* case. The larger Bench had the advantage of seeing actual working of various Tribunals. It has also benefit of studying various reports on functioning of such Tribunals including a well-studied and in-depth report of the Arrears Committee (1989-90). It is submitted that the decision in *Chandra Kumar* is a progressive step in the direction of independence of judiciary and must be welcomed by one and all as it seeks to restore jurisdiction and constitutional status of High Courts and of the Supreme Court in the direction of re-enforcement of Rule of Law.

One thing, however, should be noted. According to the Court, as administrative tribunals perform a supplemental role and as the decisions rendered by them are subject to scrutiny by a Division Bench of respective High Courts, a party aggrieved by a decision of the tribunal cannot directly approach the Supreme Court by invoking Article 136 of the Constitution.

The Court stated:

"We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. *In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court, the aggrieved party could move this Court under Article 136 of the Constitution.*"⁷ (emphasis supplied)

6. (1997) 3 SCC 261(311); AIR 1997 SC 1125(1156)

7. *Id.* at p. 308 (SCC); 1154 (AIR).

It is submitted that the above observations are not in consonance with the provisions of the Constitution and do not state the legal position correctly. Article 136 of the Constitution confers plenary powers on the Supreme Court to grant Special Leave to Appeal against orders passed by all courts and tribunals which cannot be taken away or curtailed. "The Constitution for the best reasons did not choose to fetter or circumscribe the powers exercisable under that Article (Article 136) in any way."⁸ The Court was, therefore, not right in concluding that the legal position regarding Article 136 of the Constitution will also stand modified. It is respectfully submitted that the Court had no jurisdiction to 'modify' the Constitution and to that extent *Chandra Kumar* requires reconsideration.

25. CONCLUSIONS

A sound justice delivery system is a *sine qua non* for the efficient governance of a country wedded to the Rule of Law. An independent and impartial judiciary in which the litigating public has faith and confidence alone can deliver the goods.⁹

In a democracy governed by rule of law, the only acceptable repository of justice is a court of law. Judicial review is an integral part of our legal system and basic and essential feature of the Constitution and it cannot be dispensed with by creating tribunals under Articles 323-A and 323-B of the Constitution. Any institutional mechanism or authority in negation of judicial review is destructive of basic structure. So long as the alternative institutional mechanism set up by any Act is not less effective than the High Court, it is consistent with the constitutional scheme. The faith of the people is the bedrock on which the edifice of judicial review and efficacy of the adjudication are founded. The alternative arrangement must, therefore, be effective and efficient. For inspiring confidence and faith in the litigating public they must have an assurance that the persons deciding their disputes are totally and completely free from influence or pressure from executive. To maintain independence and impartiality, it is necessary that the persons appointed in tribunals have judicial and objective approach as also sufficient knowledge and legal training.¹⁰

8. *Bharat Bank Ltd. v. Employees*, AIR 1950 SC 188(193); 1950 SCR 459(473-74); *Durga Shankar v. Raghuraj Singh*, AIR 1954 SC 520(522); (1955) 1 SCR 267(373-73). For detailed discussion, see V.G. Ramachandran: *Law of Writs*, (1993), pp. 838-74.

9. *Chandra Kumar v. Union of India*, (1997) 3 SCC 261, 306, 311; AIR 1997 SC 1125; *R.K. Jain v. Union of India*, (1993) 4 SCC 119(134).

10. *Ibid.*, see also *Sampath Kumar v. Union of India*, (1987) 1 SCC 124; AIR 1987

It is submitted that the following observations of Arrears Committee (Malimath Committee) must always be borne in mind while dealing with the powers and jurisdiction of tribunals. After indepth study, the Committee concluded:

*"It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Court and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism is substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid."*¹¹

SC 386: (1987) 1 SCR 435; *S.S. Bola v. B.D. Sardana*, (1997) 8 SCC 522: AIR 1997 SC 3127(3166-71).

11. Report of Arrears Committee, (1989-90), Vol. II, Chapter VIII, para 8-65 cited in *Chandra Kumar v. Union of India*, (*supra*).

Lecture VIII

Judicial Review of Administrative Discretion

We will not make justices, constables, sheriffs or bailiffs who do not know the law of the land and mean to observe it well.

—MAGNA CARTA

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler.... Where discretion is absolute man has always suffered.

—JUSTICE DOUGLAS

Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

—JUSTICE COKE

SYNOPSIS

1. Introduction
2. Administrative discretion: Meaning
3. Judicial review: Meaning
4. Judicial review: Object
5. Judicial review: Nature and scope
6. Judicial review and justiciability
7. Judicial review: Limitations
8. Overriding considerations
9. Discretionary power and judicial review
10. Grounds
11. Failure to exercise discretion
 - (a) Sub-delegation
 - (b) Imposing fetters on discretion by self-imposed rules of policy
 - (c) Acting under dictation
 - (d) Non-application of mind
 - (e) Power coupled with duty
12. Excess or abuse of discretion
 - (a) Absence of power
 - (b) Exceeding jurisdiction
 - (c) Irrelevant considerations
 - (d) Leaving out relevant considerations
 - (e) Mixed considerations
 - (i) General
 - (ii) Conclusion based on subjective satisfaction
 - (iii) Conclusion based on objective facts

- (iv) Correct principle
- (f) Mala fide
 - (i) General
 - (ii) Definition
 - (iii) Types
 - (A) Malice in fact
 - (B) Malice in law
 - (iv) Test
 - (v) Burden of proof
 - (vi) Counter-affidavit
 - (vii) Summary dismissal
 - (viii) Legislative power and mala fides
- (g) Improper object: Collateral purpose
- (h) Colourable exercise of power
- (i) Non-observance of natural justice
- (j) Unreasonableness
 - (i) General
 - (ii) Meaning
 - (iii) Ambit and scope
 - (iv) Leading cases
 - (v) Test
 - (vi) Burden of proof
 - (vii) Conclusions
- 13. Doctrine of proportionality
 - (a) General
 - (b) Doctrine explained
 - (c) Nature and scope
 - (d) Illustrative cases
 - (e) Proportionality and reasonableness
 - (f) Conclusions
- 14. Doctrine of legitimate expectations
 - (a) General
 - (b) Nature and scope
 - (c) Object
 - (d) Doctrine explained
 - (e) Development
 - (f) Illustrations
 - (g) Leading cases
 - (h) Consequences
 - (i) Legitimate expectation and estoppel
 - (j) Duty of applicant
 - (k) Duty of authority
 - (l) Duty of court
 - (m) Limitations
 - (n) Conclusions
- 15. Conclusions

1. INTRODUCTION

As discussed in the previous lectures, the traditional theory of '*laissez faire*' has been given up by the State and the old 'police State' has now become a 'welfare State'. Because of this philosophy, governmental functions have increased. The administrative authorities have acquired vast discretionary powers and generally, exercise of those powers are left to the subjective satisfaction of the administration without laying down the statutory guidelines or imposing conditions on it. The administration administers law enacted by the legislature and thus performs executive functions; it also enacts legislation when the legislative powers are delegated to it by the legislature and it also interprets law through administrative tribunals. Thus, practically there is concentration of all powers in the hands of the administration — legislative, executive and judicial.

2. ADMINISTRATIVE DISCRETION: MEANING

The best definition of 'administrative discretion' is given by Professor Freund¹ in the following words:

"When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of consideration not entirely susceptible of proof or disproof.... It may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination."

Thus, in short, here the decision is taken by the authority *not only on the basis of the evidence* but in accordance with policy or expediency and in exercise of discretionary powers conferred on that authority.

3. JUDICIAL REVIEW: MEANING

Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land.²

Broadly speaking, judicial review in India deals with three aspects; (i) judicial review of legislative action; (ii) judicial review of judicial decision; and (iii) judicial review of administrative action. In this lecture, we are concerned with the last aspect, namely, judicial review of administrative action.³

1. *Administrative Powers over Persons and Property*, 1928, p. 71.

2. Henry Abraham cited in *Chandra Kumar v. Union of India*, (1997) 3 SCC 261 (292): AIR 1997 SC 1125.

3. *Chandra Kumar v. Union of India*, (1997) 3 SCC 261 (292): AIR 1997 SC 1125.

4. JUDICIAL REVIEW: OBJECT

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law.⁴

As observed by the Supreme Court in *Minerva Mills Ltd. v. Union of India*⁵, the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation. It is the solemn duty of the judiciary under the Constitution to keep different organs of the State within the limits of the power conferred upon them by the Constitution by exercising power of judicial review as *sentinel on the qui vive*. Thus, judicial review aims to protect citizens from abuse or misuse of power by any branch of the State.

Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per government policy, and the need of fairness. Any unfair action must be set right by administrative review.⁶

5. JUDICIAL REVIEW: NATURE AND SCOPE

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of our Constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the Constitution. It is, therefore, their duty to find out the extent and limits of the power of coordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. *Judicial review is thus the touchstone and essence of the rule of law.*⁷

(emphasis supplied)

4. *Chief Constable v. Evans*, (1982) 3 All ER 141; (1982) 1 WLR 1155; *Sterling Computers Ltd. v. M & N Publications*, (1993) 1 SCC 445, 458; AIR 1996 SC 51; *Mahesh Chandra v. U.P. Financial Corpn.*, (1993) 2 SCC 279; *G.B. Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91; AIR 1991 SC 1153; *LIC of India v. C.E.R.C.*, (1995) 5 SCC 482; AIR 1995 SC 1811.

5. (1980) 3 SCC 625 (677-78); AIR 1980 SC 1789 (1925-26). See also *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568(574-75); AIR 1981 SC 344 (347).

6. *Tata Cellular v. Union of India*, (1994) 6 SCC 651; AIR 1996 SC 11, 13.

7. *R.K. Jain v. Union of India*, (1993) 4 SCC 119 (168); *Sitaram v. State of U.P.*, (1972) 4 SCC 485; AIR 1972 SC 1168; *Krishna Swami v. Union of India*,

The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution.⁸

In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter. The areas where judicial power can operate are limited to keep the executive and legislature within the scheme of division of powers between three organs of the State. The ultimate scope of judicial review depends upon the facts and circumstances of each case. The dimensions of judicial review must remain flexible.⁹

It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the Constitution. The rule of law requires that the exercise power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the Constitution. Judicial review is thus the touchstone and repository of the supreme law of the land. It is a vital principle of our Constitution which cannot be abrogated without affecting the basic structure of the Constitution.¹⁰

In recent times, judicial review of administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Under the old theory, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and giant public corporations have come in existence, the stake of public exchequer justifies larger public audit and judicial control.¹¹

(1992) 4 SCC 605 (649).

8. *Id.*; see also *Dwarkadas Marfatia v. Board of Trustees*, (1989) 3 SCC 293; AIR 1989 SC 1642; *Mahabir Auto Stores v. Indian Oil Corpn.*, (1990) 3 SCC 752; AIR 1990 SC 1031; *Shreelekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212; AIR 1991 SC 537.

9. *Shreeram v. Settlement Commr.*, (1989) 1 SCC 628; AIR 1989 SC 1038; *State of H.P. v. Umed Ram*, (1986) 2 SCC 68 (80-83); AIR 1986 SC 847; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (para 376).

10. *S.R. Bommai v. Union of India*, (*supra*), p. 207 (SCC); *S.S. Bola v. B.D. Sardana*, (1997) 8 SCC 522; AIR 1997 SC 3127 (3167).

11. *Star Enterprises v. City & Industrial Development Corpn.*, (1990) 3 SCC 280 (284).

6. JUDICIAL REVIEW AND JUSTICIABILITY

Judicial review must be distinguished from justiciability. The two concepts are not synonymous. The power of judicial review goes to the authority of the court and can be exercised by the court in appropriate cases.¹²

Justiciability is not a legal concept with fixed contents, nor is it susceptible of scientific verification. There is not and there cannot be a uniform rule regarding scope and reach of judicial review applicable to all cases. It varies from case to case depending upon subject-matter, nature of right and other relevant factors.¹³

The power of judicial review relates to the jurisdiction of the court whereas justiciability is hedged by self-imposed judicial restraint. A court exercising judicial review may refrain to exercise its power if it finds that the controversy raised before it is not based on judicially discoverable and manageable standards. Moreover, the area of justiciability can be reduced or curtailed.¹⁴ Even when, exercise of power is bad, the court in its discretion decline to grant relief considering the facts and circumstances of the case.¹⁵

7. JUDICIAL REVIEW: LIMITATIONS

Judicial review has certain inherent limitations. It is suited more for adjudication of disputes than for performing administrative functions. It is for the executive to administer the law and the function of the judiciary is to ensure that the Government carries out its duty in accordance with the provisions of the Constitution.¹⁶

The duty of the court is to confine itself to the question of legality. It has to consider whether a decision-making authority exceeded its powers, committed an error of law, violated rules of natural justice, reached a decision which no reasonable man would have reached or otherwise abused its powers. Though the court is not expected to act as a court of appeal, nevertheless it can examine whether the "decision-making process" was reasonable, rational, not arbitrary or not violative

12. *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (paras 201, 256-58).

13. *Ibid.*, See also *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 (753); AIR 1993 SC 477.

14. *S.R. Bommai v. Union of India*, *Id.* at para 211 (SCC); *K. Ashok Reddy v. Union of India*, (1994) 2 SCC 303; *A.K. Kaul v. Union of India*, (1995) 4 SCC 73; AIR 1995 SC 1403.

15. *State of Rajasthan v. Laxmi*, (1996) 6 SCC 445.

16. *S.R. Bommai v. Union of India*, (*supra*), at para 376 (SCC); see also *G. B. Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91 (109); AIR 1991 SC 1153.

of Article 14 of the Constitution. The parameters of judicial review must be clearly defined and never exceeded. If the authority has faltered in its wisdom, the court cannot act as super auditor.¹⁷

Unless the order passed by an administrative authority is unlawful or unconstitutional, power of judicial review cannot be exercised. An order of administration may be right or wrong. It is the administrator's right to trial and error and so long as it is bonafide and within the limits of the authority, no interference is called for. In short, power of judicial review is supervisory in nature. Unless this restriction is observed, the court, under the guise of preventing abuse of power by the administrative authority, will itself be guilty of usurping power.¹⁸

Bernard Schwartz¹⁹ rightly stated:

"If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. It makes judicial review of administrative orders a hopeless formality for the litigant. .. It reduces the judicial process in such cases to a mere feint."

8. OVERRIDING CONSIDERATIONS

Two overriding considerations are responsible to narrow the scope of judicial review;

- (a) Due deference to administrative expertise. It is not expected of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator; and

17. *S.R. Bommai v. Union of India* (supra), para 64 (SCC); *Board of High School v. Chitra Ghosh*, (1970) 1 SCC 121; AIR 1970 SC 1039; *State of H.P. v. Umed Ram* (supra); *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568; AIR 1981 SC 344; *G.B. Mahajan v. Jalgaon Municipal Council* (supra).

18. *Id.*; see also *Tata Cellular v. Union of India*, (1994) 6 SCC 651 (677); AIR 1996 SC 11. *R. v. Panel on Take-overs*, (1987) 1 All ER 564; *Sterling Computers Ltd. v. M & N Publications Ltd.*, (1993) 1 SCC 445; AIR 1996 SC 51.

19. *Administrative Law*, 2nd Edn., p. 584 cited in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 (680); AIR 1996 SC 11, 13.

- (b) Paucity of time. It is the pressure of judicial calendar which leads to perfunctory affirmance of the vast majority of agency decisions.²⁰

In *Tata Cellular v. Union of India*,²¹ the Supreme Court stated, "The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention, the other covers the scope of the court's ability to quash an administrative decision on its own merits. *These restraints bear the hallmarks of judicial control over administrative action.*

(emphasis supplied)

9. DISCRETIONARY POWER AND JUDICIAL REVIEW

Discretionary powers conferred on the administration are of different types. They may range from simple ministerial functions like maintenance of births and deaths register to powers which seriously affect the rights of an individual, e.g. acquisition of property, regulation of trade, industry or business, investigation, seizure, confiscation and destruction of property, detention of a person on subjective satisfaction of an executive authority and the like.

As a general rule, it is accepted that courts have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers. In *Small v. Moss*²², the Supreme Court of the United States observed:

"Into that field (of administrative discretion) the courts may not enter."

Lord Halsbury²³ also expressed the same view and observed:

"Where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion."

In India also, the same principle is accepted and in a number of cases, the Supreme Court has held that courts have no power to interfere with the orders passed by the administrative authorities in exercise of discretionary powers.²⁴

20. Bernard Schwartz: *Administrative Law* 2nd Edn., p. 584 cited in *Tata Cellular v. Union of India*. (infra).

21. (1994) 6 SCC 651 (676); AIR 1996 SC 11, 13 (28).

22. (1938) 279 NY 288.

23. *Westminster Corpn. v. London & North Western Rly. Co.*, (1905) AC 426 (427); 93 LT 143; 74 LJ Ch 629; see also de Smith: *Judicial Review of Administrative Action*, 1995, p. 296.

24. *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27; 1950 SCR 88; *Bhimsen v.*

This does not, however, mean that there is no control over the discretion of the administration. As indicated above, the administration possesses vast discretionary powers and if complete and absolute freedom is given to it, it will lead to arbitrary exercise of power. The wider the discretion the greater is the possibility of its abuse. As it is rightly said 'every power tends to corrupt and absolute power tends to corrupt absolutely'. All powers have legal limits. The wider the power, the greater the need for the restraint in its exercise. There must be control over discretionary powers of the administration so that there will be a 'Government of laws and not of men'. It is not only the power but the duty of the courts to see that discretionary powers conferred on the administration may not be abused and the administration should exercise them properly, responsibly and with a view to doing what is best in the public interest. 'It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion.'²⁵ 'Wide discretion must be in all administrative activity but it should be discretion defined in terms which can be measured by legal standards lest cases of manifest injustice go unheeded and unpunished.'²⁶ As early as in 1647,²⁷ it was laid down by the King's Bench that 'wheresoever a Commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this Court hath power to redress things otherwise done by them'. In *Sharp v. Wakefield*²⁸, Lord Halsbury rightly observed:

" '[D]iscretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion ... according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself...."

There is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a Government under law, there can be no such thing as unreviewable discretion. The law always frowns on

State of Punjab, AIR 1951 SC 481; 1952 SCR 18; *Lakhanpal v. Union of India* AIR 1967 SC 908; (1967) 1 SCR 434; *Ram Manohar Lohia v. State of Bihar* AIR 1966 SC 740; (1966) 1 SCR 709; *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611 (621); AIR 1987 SC 2386 (2390).

25. Wade: *Administrative Law*, 1994, pp. 379-459.

26. Wade: *Courts and Administrative Process*, 1949, 63 LQR 173.

27. *Estwick v. City of London*, (1647) Style 42.

28. (1891) AC 173 (179); (1886-90) All ER 651; 39 WR 561.

uncanalised and unfettered discretion conferred on any instrumentality of the State and it is the glory of administrative law that such direction has been through judicial decisions structured and regulated.²⁹ It is true that abuse of power is not to be assumed lightly but, experience belies the expectation that discretionary powers are always exercised fairly and objectively.³⁰ The basic rule should be that the governing power wherever located must be subject to the fundamental constitutional limitations.³¹

Thus, in almost all the democratic countries it is accepted that discretion conferred on the administration is not unfettered, uncontrolled or non-reviewable by the courts. To keep the administration within its bounds, the courts have evolved certain principles and imposed some conditions and formulated certain tests and taking recourse to these principles, they effectively control the abuse or arbitrary exercise of discretionary power by the administration. In India, where in a written Constitution the power of judicial review has been accepted as the 'heart and core' of it and which is treated as the 'basic and essential feature of the Constitution' and 'the safest possible safeguard' against abuse of power by any administrative authority, the judiciary cannot be deprived of the said power.³²

10. GROUNDS

While exercising power of judicial review, the Court does not exercise appellate powers. It is not intended to take away from administrative authorities the powers and discretion properly vested in them by law and to substitute courts as the bodies making the decisions. Judicial review is a protection and not a weapon.³³

29. *Jaisinghani v. Union of India*, AIR 1967 SC 1427; (1967) 2 SCR 714; *Khudiram v. State of W.B.*, (1975) 2 SCC 81; AIR 1975 SC 550; *Govt. Press v. Balliappa*, (1979) 1 SCC 447; AIR 1979 SC 429; *Sheonandan Paswan v. State of Bihar*, (1987) 1 SCC 288 (323); AIR 1987 SC 877 (895).

30. *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600; AIR 1991 SC 101 (173); *State of Maharashtra v. Kamal Durgule*, (1985) 1 SCC 234 (245-46); AIR 1985 SC 119.

31. *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, *Id.* at pp. 632, 707 (SCC).

32. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (677-78); AIR 1980 SC 1789 (1825-26); *State of U.P. v. Maharaja Dharmander Prasad Singh*, (1989) 2 SCC 505 (524-25); AIR 1989 SC 997 (1010); *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 (para 332); AIR 1982 SC 149; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (177).

33. *Chief constable v. Evans*, (*supra*); *R. v. Panel of Take-overs & Mergers*, (1989) 1 All ER 509; (1990) 1 QB 146; *Amin v. Entry Clearance Officer*, (1983) 2 All ER 864; *Tata Cellular v. Union of India*, (1994) 6 SCC 651; AIR 1996 SC 11, 13; *Lonhro v. Secy. of State*, (1989) 2 All ER 609.

In *Chief Constable v. Evans*,³⁴ Lord Brightman said, "Judicial review is concerned not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power." (emphasis supplied)

The duty of the court is to confine itself to the question of legality. Its concern should be:

- (1) whether a decision-making authority exceeded its powers?
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached or,
- (5) abused its powers.³⁵

In India, the courts will interfere with the discretionary powers exercised by the administration in the following circumstances:

- (1) Failure to exercise discretion; or
- (2) Excess or abuse of discretion.

Let us consider each ground in *extenso*:

11. FAILURE TO EXERCISE DISCRETION

The main object of conferring discretionary power on an administrative authority is that the authority itself must exercise the said power. If there is failure to exercise discretion on the part of that authority the action will be bad. Such type of flaw may arise in the following circumstances:

- (a) Sub-delegation;
- (b) Imposing fetters on discretion by self-imposed rules of policy;
- (c) Acting under dictation;
- (d) Non-application of mind; and
- (e) Power coupled with duty.

(a) Sub-delegation

de Smith³⁶ says, "a discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual

34. (1982) 3 All ER 141 (154); (1982) 1 WLR 1155.

35. *Tata Cellular v. Union of India*, (1994) 6 SCC 651(677); AIR 1996 SC 13(26).

36. *Judicial Review of Administrative Action*, 1995, p. 357.

judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another". The very object of conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official. "Delegation may be the result of honest misapprehension by the authority concerned of the legal position. It sometimes arises out of a desire to expedite official business. But still it will be invalid if it is not legally permitted."³⁷

Thus, in *Allingham v. Minister of Agriculture*³⁸ and *Ganpati Singhji v. State of Ajmer*³⁹, the sub-delegation of power was held to be bad. Likewise, in *Sahni Silk Mills v. ESI Corpn.*⁴⁰, the parent Act enabled the corporation to delegate its power to recover damages to the Director General, who, however, in turn sub-delegated the said power to Regional-Directors. Since there was no such provision permitting the Director General to sub-delegate his power, the action was held to be bad. But in *Pradyat Kumar v. Chief Justice of Calcutta*⁴¹, the inquiry against the Registrar of the High Court was made by a puisne Judge of the Court. After considering the report and giving show-cause notice, he was dismissed by the Chief Justice. The Supreme Court held that it was not a case of delegation of power by the Chief Justice but merely of employing a competent officer to assist the Chief Justice.

(b) Imposing fetters on discretion by self-imposed rules of policy

An authority entrusted with discretionary power must exercise the same after considering individual cases. Instead of doing that if the authority imposes fetters on its discretion by adopting fixed rules of policy to be applied in all cases coming before it, there is failure to exercise *discretion* on the part of that authority. What is expected of the authority is that it must consider the facts of each case, apply its mind and decide the same. If any general rule is pronounced, which will be applied to all cases, there is no question of considering the facts of an individual case at all and exercising discretion by the authority.

Thus, in *Gell v. Taja Noora*⁴², under the Bombay Police Act, 1863, the Commissioner of Police had discretion to refuse to grant a licence

37. Markose: *Judicial Control of Administrative Action in India*, 1956, p. 395.

38. (1948) 1 All ER 780. For facts, see Lecture IV (*supra*).

39. AIR 1955 SC 188; (1955) 1 SCR 1065. For facts, see Lecture IV (*supra*).

40. (1994) 5 SCC 346.

41. AIR 1956 SC 285; (1955) 2 SCR 1331. For detailed discussion about sub-delegation, see Lecture IV (*supra*).

42. ILR (1907) 27 Bom 307.

for any land conveyance 'which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public'. Instead of applying this discretionary power to individual cases, he issued a general order that any Victoria presented for licence must be of a particular pattern. The High Court of Bombay held the order bad as the Commissioner had imposed fetters on his discretion by self-imposed rules of policy and failed to consider in respect of each individual carriage whether or not it was fit for the conveyance of the public.

Similarly, in *Keshavan Bhaskaran v. State of Kerala*⁴³, the relevant rule provided that no school-leaving certificate would be granted to any person unless he had completed fifteen years of age. The Director was, however, empowered to grant exemption from this rule in deserving cases under certain circumstances. But the Director had made an invariable rule of not granting exemption unless the deficiency in age was less than two years. The court held that the rule of policy was contrary to law.

In *Tinkler v. Wandsworth Board of Works*⁴⁴, a sanitary authority laid down a general rule that all cesspits and privies in its area should be replaced by water-closets and did not consider each case on merits. The Court of Appeal held the action bad. In *R. v. Metropolitan Police Commr.*⁴⁵, a chief constable adopted a rigid rule not to institute any prosecution at all for an anti-social class of criminal offence. The action was held to be bad.

In *Rama Sugar Ind. v. State of A.P.*⁴⁶, tax was imposed on the purchase of sugarcane but the Government was granted power to exempt any new sugar factory from payment of tax for a period of three years. The Government, however, by way of policy decision decided to grant such exemption only in favour of the cooperative sector. The appellant challenged the said policy. The Constitution Bench, by majority of 3: 2, upheld the decision of the Government. It is submitted that the majority decision is not correct. The minority rightly observed: "In fact, the Government by making the policy decision, had shut its ears to the merits of the individual applications."⁴⁷ (emphasis supplied)

Likewise, in *Gurbaksh Singh v. State of Punjab*⁴⁸, the Supreme Court observed that no principles of universal application can be laid down

43. AIR 1961 Ker 23.

44. (1858) 27 LJ Ch 342; 6 WR 390.

45. (1968) 2 QB 118; (1968) 1 All ER 763; (1968) 2 WLR 893.

46. (1974) 1 SCC 534; AIR 1974 SC 1745.

47. *Id.* at p. 546 (SCC); 1753 (AIR) (per Mathew, J.).

48. (1980) 2 SCC 565(580); AIR 1980 SC 1632(1641).

regarding granting of anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973. "Generalisations on matters which rest on discretion and an attempt to discover formula of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion."

Again, in *Nagraj v. Syndicate Bank*⁴⁹, the Ministry of Finance issued a direction to all banks to accept the punishment proposed by the Vigilance Commission against a delinquent officer. Holding the directive to be "wholly without jurisdiction" and "completely fettered", the Supreme Court held that the authorities have to exercise their judicial discretion having regard to the facts and circumstances of each case.

This does not, however, mean that no principle can be laid down or policy adopted. The only requirement is that even when a general policy is adopted, each case must be considered on its own merits. As Lord Reid⁵⁰ rightly states, a Minister having a discretion, may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good administration requires it, '*provided the authority is always willing to listen to anyone with something new to say*'. (emphasis supplied). The administrative authority exercising discretion must not 'shut its ears to an application'. It is submitted that the test is correctly laid down in *Stringer v. Minister of Housing*⁵¹, wherein Lord Cooke, J. rightly observed: "[A] Minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy in regard to matters which are relevant to those decisions, *provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case as it comes up for decision.*"⁵²

(emphasis supplied)

(c) Acting under dictation

Sometimes, an authority entrusted with a power does not exercise that power but acts under the dictation of a superior authority. Here, the authority invested with the power purports to act on its own but 'in substance' the power is exercised by another. The authority concerned does not apply its mind and take action on its own judgment, even though

49. (1991) 3 SCC 219; AIR 1991 SC 1507.

50. *British Oxygen Co. Ltd. v. Minister of Technology*, (1970) 3 WLR 488(495): (1970) AC 610; (1970) 3 All ER 165.

51. (1970) 1 WLR 1281; (1971) 1 All ER 65.

52. *Id.* at p. 1298 (WLR). For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 321-28.

it was not so intended by the statute. In law, this amounts to non-exercise of power by the authority and the action is bad. It is well-settled that if the authority permits its decision to be influenced by the dictation of others, it would amount to abdication and surrender of discretion. If the authority "hands over its discretion to another body it acts ultra vires".⁵³

Thus, in *Commissioner of Police v. Gordhandas*⁵⁴, under the City of Bombay Police Act, 1902, the Commissioner of Police granted licence for the construction of a cinema theatre. But later on, he cancelled it at the direction of the State Government. The Supreme Court set aside the order of cancellation of licence as the Commissioner had acted merely as the agent of the Government.

Similarly, in *Orient Paper Mills v. Union of India*⁵⁵, under the relevant statute, the Deputy Superintendent was empowered to levy excise. Instead of deciding it independently, the Deputy Superintendent ordered levy of excise in accordance with the directions issued by the Collector. The Supreme Court set aside the order passed by the Deputy Superintendent.

Likewise, in *Rambharosa Singh v. State of Bihar*⁵⁶, the relevant rules empowered the District Magistrate to give public ferries on lease, subject to the direction of the Commissioner. Instead of the Commissioner, the Government gave certain directions. The District Magistrate acted in accordance with those directions. The High Court set aside the order passed by the District Magistrate.

Again, in *Anirudhsinhji Jadeja v. State of Gujarat*⁵⁷, an offence was committed under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). The District Superintendent of Police did not give approval on his own but requested the Additional Chief Secretary to accord permission to proceed under the Act, which was granted. Setting aside the order, the Court stated, "(T)he dictation came on the prayer of the DSP will not make any difference to the principle."

A reference may be made to another decision of the Supreme Court in *Mansukhlal v. State of Gujarat*.⁵⁸ In that case, the government did not

53. *State of U.P. v. Maharaja Dharmander*, (1989) 2 SCC 505 (523-24): AIR 1989 SC 997.

54. AIR 1952 SC 16; 1952 SCR 135.

55. (1970) 3 SCC 76; AIR 1970 SC 1498.

56. AIR 1953 Pat 370. See also *Orient Paper Mills v. Union of India*, AIR 1969 SC 48; (1969) 1 SCR 245; *Purtabpore Co. Ltd. v. Cane Commr. of Bihar*, (1969) 1 SCC 308; AIR 1970 SC 1896.

57. (1995) 5 SCC 302 (308); AIR 1995 SC 2390 (2393).

58. (1997) 7 SCC 622; (1997) 8 Supreme 178.

grant sanction to prosecute appellant (public servant) under the Prevention of Corruption Act. The complainant filed a petition in the High Court and the High Court 'directed' the authorities to grant sanction. The appellant was prosecuted and convicted. Setting aside the conviction, the Supreme Court observed that "by issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction". The sanction was, therefore, illegal and conviction bad in law.

There is, however, a distinction seeking advice or assistance on the one hand and acting under dictation on the other hand. Advice or assistance may be taken and then discretion may be exercised by the authority concerned genuinely without blindly and mechanically acting on the advice. For instance, a licensing authority may take into account the general policy of the Government in granting licences, provided it decides each case on its own merits. In *Gordhandas*, the Supreme Court observed that the Commissioner was "entitled to take into consideration the advice tendered to him by a public body set up for this express purpose, and he was entitled in the *bona fide* exercise of his discretion to accept that advice and act upon it even though, he would have acted differently if this important factor had not been present in his mind when he reached a decision".⁵⁹

In *Baldev v. Union of India*⁶⁰, the appellant was compulsorily retired in public interest by the Accountant General at the recommendation of the Reviewing Committee. It was contended that the Accountant General acted as per dictation of the Committee. The Supreme Court negatived the contention observing that the decision was of Accountant General and taking advice of the committee was not illegal.

In *Barium Chemicals v. Company Law Board*⁶¹, investigation of the affairs was ordered by the Chairman. That action was challenged *inter alia* on the ground that it was taken at the behest of the Finance Minister. Holding the order legal and valid, the Court observed that the circumstances might create suspicion, but suspicion, however grave, cannot take the place of proof.

An interesting question arose in the case of *R. v. Waltham Forest London Borough Council*⁶². The respondent council by a resolution increased the rates of house tax. Ratepayers challenged the said resolution

59. AIR 1952 SC 16(18); 1952 SCR 135.

60. (1980) 4 SCC 321; AIR 1981 SC 70.

61. AIR 1967 SC 295(320); 1966 Supp SCR 311 (Shelat, J.).

62. (1987) 3 All ER 671; (1988) QB 419.

inter alia on the ground that certain councillors who had voted in favour of the resolution had voted against it prior to a council meeting. They had voted in favour of the resolution due to the party 'whip' and thus, had fettered their discretion by obeying the whip. Really they had acted under dictation. Rejecting the argument, Donaldson, M.R. observed:

*"The distinction between giving great weight to the views of colleagues and to party policy, on the one hand, and voting blindly in support of party policy may on occasion be a fine one, but it is nevertheless very real."*⁶³ (emphasis supplied)

(d) Non-application of mind

When a discretionary power is conferred on an authority, the said authority must exercise that power after applying its mind to the facts and circumstances of the case in hand. If this condition is not satisfied, there is clear non-application of mind on the part of the authority concerned. The authority might be acting mechanically, without due care and caution or without a sense of responsibility in the exercise of its discretion. Here also, there is failure to exercise discretion and the action is bad.

Thus, in *Emperor v. Sibnath Banerji*⁶⁴, an order of preventive detention was quashed as it had been issued in a routine manner on the recommendation of police authorities and the Home Secretary himself had not applied his mind and satisfied himself that the impugned order was called for or not.

Likewise, in *Jagannath v. State of Orissa*⁶⁵, in the order of detention six grounds were verbatim reproduced from the relevant section of the statute. The Home Minister filed the affidavit in support of the order. In that affidavit, he has stated that his personal satisfaction to detain the petitioner was based on two grounds. The Supreme Court held that the detaining authority must be satisfied about each of the grounds mentioned in the order. Since it was not done, as in the affidavit it was mentioned that the order was based only on two grounds and also from the fact that in the impugned order in which various grounds were mentioned, instead of using the conjunctive "*and*" the disjunctive "*or*" had been used, there was clear non-application of mind by the Home Minister and the order was liable to be quashed.

63. *Id.* at pp. 673-76 (All ER).

64. AIR 1945 PC 156; 1945 FCR 191.

65. AIR 1966 SC 1140; (1965) 3 SCR 134.

In the well-known case of *Barium Chemicals Ltd. v. Company Law Board*⁶⁶, an order of investigation against the petitioner company was passed by the Central Government. Under the Companies Act, 1956, the Government was empowered to issue such order if, 'there are circumstances suggesting fraud on the part of the management'. It was held by the Supreme Court that it was necessary for the Central Government to state the circumstances which led to the impugned action so that the same could be examined by the Court. Shelat, J. observed:

"It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose."⁶⁷ (emphasis supplied)

Hidayatullah, J. (as he then was) also took the same view and observed: "No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the *sine qua non* for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to inference unless the existence of the circumstances is made out."⁶⁸

However, in *Ananta Mukhi v. State of W.B.*⁶⁹, even though the order of detention was passed against the petitioner 'to prevent him from acting in any manner prejudicial to the security of the State or the maintenance of public order, the Supreme Court by majority, held the order valid observing that "though all activities prejudicial to the security of the State and those which are prejudicial to the maintenance of the public order are not identical, because of close nexus between maintenance of public order and security of State, there is bound to be some overlapping".⁷⁰

Similarly, in *Monghyr Factory v. Labour Court, Patna*⁷¹, the Supreme Court held the order of reference passed under the Industrial Disputes Act, 1947 valid even though the reference contained both the

⁶⁶. AIR 1967 SC 295; 1966 Supp SCR 311.

⁶⁷. *Id.* at p. 325 (AIR).

⁶⁸. *Id.* at p. 309 (AIR); see also *Rohtas Industries (infra), Barium Chemicals Ltd. v. Rana*, (1972) 1 SCC 240; AIR 1972 SC 591.

⁶⁹. (1972) 1 SCC 580; AIR 1972 SC 1256.

⁷⁰. *Id.* at pp. 593-94 (SCC).

⁷¹. (1978) 3 SCC 504; AIR 1978 SC 1428.

clauses, viz. the industrial dispute '*exists or is apprehended*'. The Supreme Court held that there was non-application of mind by the Government, but the reference was not bad on that ground on 'the facts of the case'. The Court, however, observed that 'care should always be taken to avoid a mere copying of the words from the statute'.⁷²

(e) Power coupled with duty

A number of statutes confer powers on administrative authorities and officers to be exercised by them in their discretion. The power is in permissive language such as "may", "it shall be lawful", "it may be permissible", etc. The question is whether it is open to the authorities to exercise or not to exercise the power at their sweet wills.

de Smith⁷³ states: "Discretionary powers are frequently coupled with duties." In the words of Lord Blackburn; "enabling words were always compulsory where the words were to effectuate a legal right". In the leading case of *Julius v. Lord Bishop of Oxford*⁷⁴, the bishop was empowered to issue a commission of inquiry in case of alleged misconduct by a clergyman, either on an application by someone or *suo motu* and when such an application was made, the question was whether the Bishop had a right to refuse the commission. The House of Lords held that the Bishop had discretion to act pursuant to the complaint and no mandatory duty was imposed on him. However, Earl Cairns, L.C. made the following remarkable and oft-quoted observations:

"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise that power ought to be exercised, and the court will require it to be exercised."⁷⁵

Thus, it was held that the licensing authorities were bound to renew licences of cab-drivers if the prescribed procedural requirements had been complied with.⁷⁶ Similarly, local authorities were bound to approve building plans if they were in conformity with bye-laws.⁷⁷ Again, the court

72. *Id.* at pp. 512-13 (SCC); p. 1432 (AIR); see also *Abdul Razak Abdul Wahab v. Commr. of Police*, (1989) 2 SCC 222; AIR 1989 SC 2265; *Abhay Shridhar v. Commr. of Police*, (1991) 1 SCC 500; AIR 1991 SC 397.

73. *Judicial Review of Administrative Action*, 1995, p. 300.

74. (1880) 5 AC 214; 49 LJQB 577.

75. *Id.* at p. 225 (AC).

76. *R. v. Metropolitan Police Commr.*, (1911) 2 QB 1131.

77. *R. v. Newcastle-upon-Tyne Corpn.*, (1889) 60 LT 963.

was bound to pass a decree for possession in favour of the landlord, if the relevant facts were proved.⁷⁸

In *Commissioner of Police v. Gordhandas Bhanji*⁷⁹, the relevant rule granted *absolute discretion* to the Commissioner to cancel or suspend licence. It was argued that the Commissioner cannot be compelled to exercise the discretion. Holding the power as coupled with duty, the Supreme Court observed that the duty "cannot be shirked or shelved nor can it be evaded".

In *Hirday Narain v. ITO*⁸⁰, Section 35 of the Income Tax Act, 1922 empowered the Income Tax Officer to rectify the mistake in assessment either upon an application of the assessee or *suo motu*. Holding the said power as coupled with duty, Shah, J. (as he then was) observed: "If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. *Even if the words used in the statute are prima facie enabling the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen.*"⁸¹ (emphasis supplied)

An interesting point having far-reaching effect arose in the leading case of *Ratlam Municipality v. Vardichand*⁸². Some residents of Ratlam Municipality moved the Sub-Divisional Magistrate under Section 133 of the Code of Criminal Procedure, 1973 for abatement of nuisance by directing the municipality to construct drain pipes with flow of water to wash away the filth and stop the stench. The Magistrate found the facts proved and issued necessary directions.

Holding the provision as obligatory, Krishna Iyer, J. observed:

"Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Sub-Divisional Magistrate, Ratlam, has, before him information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act.... *This is a public duty implicit in the public*

78. *Ganpat Ladha v. Shashikant*, (1978) 2 SCC 573; AIR 1978 SC 955.

79. AIR 1952 SC 16; 1952 SCR 135.

80. (1970) 2 SCC 355; AIR 1971 SC 33.

81. *Id.* at p. 359 (SCC); 36 (AIR).

82. (1980) 4 SCC 162; AIR 1980 SC 1622.

power to be exercised on behalf of the public and pursuant to a public proceeding.'⁸³ (emphasis supplied)

12. EXCESS OR ABUSE OF DISCRETION

When discretionary power is conferred on an administrative authority, it must be exercised according to law. But as Markose⁸⁴ says, "when the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power". Thus, "if a new and sharp axe presented by Father Washington (the legislature) to young George (the statutory authority) to cut timber from the father's compound is tried on the father's favourite apple tree" an abuse of power is clearly committed.

There are several forms of abuse of discretion, e.g. the authority may exercise its power for a purpose different from the one for which the power was conferred or for an improper purpose or acts in bad faith, takes into account irrelevant considerations and so on. These various forms of abuse of discretion may even overlap. Take the classic example of the red-haired teacher, dismissed because she had red hair. In one sense, it is unreasonable. In another sense, it is taking into account irrelevant or extraneous considerations. It is improper exercise of power and might be described as being done in bad faith or colourable exercise of power. In fact, all these things 'overlap to a very great extent' and 'run into one another'.⁸⁵

Excess or abuse of discretion may be inferred from the following circumstances:

- (a) Absence of power;
- (b) Exceeding jurisdiction;
- (c) Irrelevant considerations;
- (d) Leaving out relevant considerations;
- (e) Mixed considerations;
- (f) Mala fide;
- (g) Improper purpose: Collateral purpose;
- (h) Colourable exercise of power;
- (i) Non-observance of natural justice;
- (j) Unreasonableness.

83. *Id.* at p. 170 (SCC); 1628 (AIR). For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 334-38.

84. *Judicial Control of Administrative Action in India*, 1956, p. 417.

85. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 (229); (1947) 2 All ER 680; 177 LT 641; 63 TLR 623. (per Lord Greene, M.R.).

Let us consider each ground in detail.

(a) Absence of power

It is well-settled that there can be no exercise of power unless such power exists in law. If the power does not exist, the purported exercise of power would be non-existent and void. Likewise, where the source of power exists, exercise of it is referable only to that source and not to some other source. But if a source of power exists, mention of wrong provision or even omission to mention the provision containing such power will not invalidate such order.⁸⁶

In *R. v. Minister of Transport*⁸⁷, even though the Minister had no power to revoke the licence, he passed an order of revocation. The action was held *ultra vires* and without jurisdiction. Similarly, if the appropriate government has power to refer an "industrial dispute" to a tribunal for adjudication, it cannot refer a dispute which is not an industrial dispute.⁸⁸ Again, if a taxing authority imposes tax on a commodity exempted under the Act, the action is without authority of law.⁸⁹ In *State of Gujarat v. Patel Raghav Nath*,⁹⁰ the revisional authority exercising powers under the Land Revenue Code went into the question of title. The Supreme Court observed that when the title of the occupant was in dispute, the appropriate course would be to direct the parties to approach the civil court and not to decide the question.

(b) Exceeding jurisdiction

An administrative authority must exercise the power within the limits of the statute and if it exceeds those limits, the action will be held *ultra vires*. A question whether the authority acted within the limits of its power or exceeded it can always be decided by a court.

For example, if an officer is empowered to grant a loan of Rs 10,000 in his discretion for a particular purpose and if he grants a loan of Rs 20,000, he exceeds his power (jurisdiction) and the entire order is *ultra vires* and void on that ground.

In *London County Council v. Attorney General*⁹¹, the local authority was empowered to operate tramways. The local authority also carried on a bus service. An injunction against the operation of buses by the Council

86. *Union of India v. Tulsiram*, (1985) 3 SCC 398 (500-01): AIR 1985 SC 1416.

87. (1934) 1 KB 277: (1933) All ER 604.

88. *Newspapers Ltd. v. State Industrial Tribunal*, AIR 1957 SC 532: 1957 SCR 754.

89. *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661: (1955) 2 SCR 603.

90. (1969) 2 SCC 187: AIR 1969 SC 1297.

91. (1902) AC 165: 71 LJ Ch 268.

was duly granted. Similarly, in *A.G. v. Fulham Corp.*⁹², the local authority was empowered by the statute to run municipal baths and wash-houses. An action of opening a public laundry by the corporation was held *ultra vires*.

Again, if the authority is empowered to award a claim for the medical aid of the employees, it cannot grant the said benefit to the family members of the employees.⁹³ Likewise, if the relevant regulation empowers the management to dismiss a teacher, the power cannot be exercised to dismiss the principal.⁹⁴

(c) Irrelevant considerations

A power conferred on an administrative authority by a statute must be exercised on the considerations relevant to the purpose for which it is conferred. Instead, if the authority takes into account wholly irrelevant or extraneous considerations the exercise of power by the authority will be *ultra vires* and the action bad. It is settled law that where a statute requires an authority to exercise power, such authority must be satisfied about existence of the grounds mentioned in the statute. The courts are entitled to examine whether those grounds existed when the action was taken. A person aggrieved by such action can question the legality of satisfaction by showing that it was based on irrelevant grounds. Thus, the existence of the circumstances is open to judicial review.⁹⁵

This may, however, be distinguished from *mala fide* or improper motive inasmuch as here 'the irrelevant considerations dominate not because of any deliberate choice of the authority but as a result of the honest mistake it makes about the object or scope of its powers'.⁹⁶

Thus, when the red-haired teacher was dismissed because she had red-hair, or because the teacher took an afternoon off in poignant circumstances, or that the teacher refused to collect money for pupils' meals, the action is bad in law.

In *Ram Manohar Lohia v. State of Bihar*⁹⁷, under the relevant rules, the authority was empowered to detain a person to prevent subversion of 'public order'. The petitioner was detained with a view to prevent

92. (1921) 1 Ch D 440: 90 LJ Ch 281.

93. *G.E.S. Corpn. v. Workers' Union*, AIR 1959 SC 1191.

94. *Chaudhary v. Datta*, AIR 1958 SC 722: 1959 SCR 455; see also *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295: 1966 Supp SCR 311.

95. *Indian Nut Products v. Union of India*, (1994) 4 SCC 269 (275).

96. Markose: *Judicial Control of Administrative Action in India*, 1956, p. 417.

97. AIR 1966 SC 740: (1966) 1 SCR 709.

him from acting in a manner prejudicial to the maintenance of 'law and order'. The Supreme Court set aside the order of detention. According to the Court, the term 'law and order' was wider than the term 'public order'.

Similarly, in *R.L. Arora v. State of U.P.*¹, under the provisions of the Land Acquisition Act, 1894 the State Government was authorised to acquire land for a company if the Government was satisfied that 'such acquisition is needed for the construction of a work and that such work is likely to prove useful to the public'. In this case, the land was acquired for a private company for the construction of a factory for manufacturing textile machinery. The Supreme Court, by majority, held that even though it was a matter of subjective satisfaction of the Government, since the sanction was given by the Government on irrelevant and extraneous considerations, it was invalid. Wanchoo, J. (as he then was) observed:

"The Government cannot both give meaning to the words and also say that they are satisfied on the meaning given by them. The meaning has to be given by the court and it is only thereafter that the Government's satisfaction may not be open to challenge if they have carried out the meaning given to the relevant words by the court."² (emphasis supplied)

In *Rohtas Industries Ltd. v. Agrawal*³, an order of investigation was issued against the petitioner company *inter alia* on the ground that there were a number of complaints of misconduct against one of the leading directors of the company in relation to other companies under his control. The Supreme Court quashed the order holding the ground irrelevant.

In *Hukam Chand v. Union of India*⁴, under the relevant rule, the Divisional Engineer was empowered to disconnect any telephone on the occurrence of a 'public emergency'. When the petitioner's telephone was disconnected on the allegation that it was used for illegal forward trading (*satta*) the Supreme Court held that it was an extraneous consideration and arbitrary exercise of power by the authority.

In *State of M.P. v. Ramshanker*⁵, services of a teacher were terminated on the ground that he had taken part in RSS and Jan Sangh activities. Observing that to deny employment to an individual because of

1. AIR 1962 SC 764; 1962 Supp (2) SCR 149.

2. *Id.* at p. 772 (AIR).

3. (1969) 1 SCC 325; AIR 1969 SC 707.

4. (1976) 2 SCC 128; AIR 1976 SC 789.

5. (1983) 2 SCC 145; AIR 1983 SC 374.

his political affinities would be violative of Articles 14 and 16 of the Constitution, the Supreme Court set aside the order.

(d) Leaving out relevant considerations

As discussed above, the administrative authority cannot take into account irrelevant or extraneous considerations. Similarly, if the authority fails to take into account relevant considerations, then also, the exercise of power would be bad. But it is very difficult to prove that certain relevant factors have not been taken into consideration by the authority, unless detailed reasons are given in the impugned order itself from which it can be inferred. Still, however, sometimes the relevant considerations are prescribed by the statute itself, e.g. "regard shall be had to", "must have regard to", etc. Here, the matter so specified must be taken into account.

In *Rampur Distillery Co. v. Company Law Board*⁶, the Company Law Board refused to give its approval for renewing the managing agency of the Company. The reason given by the Board for not giving its approval was that the Vivian Bose Commission had severely criticized the dealings of the Managing Director, Mr Dalmia. The court conceded that the past conduct of the directors were a relevant consideration, but before taking a final decision, it should take into account their present activities also.

Again, in *Ashadevi v. Shivraj*⁷, an order of detention was passed against the detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). The order was based on the detenu's confessional statements made before the Customs authorities. But the said confessional statements were subsequently retracted by the detenu before the order of detention. The Supreme Court held that the question whether the earlier statements recorded were voluntary or not was a 'vital' fact which ought to have been considered by the detaining authority before passing the order of detention. But if such retraction is an afterthought, it will not vitiate subjective satisfaction.⁸

The words "having regard to", however, do not mean that the authority cannot take into account other factors. The expression "having regard to" cannot be read as "having regard only to". The authority must

6. (1969) 2 SCC 774; AIR 1970 SC 1789.

7. (1979) 1 SCC 222; AIR 1979 SC 447; see also *Sk. Nizamuddin v. State of W.B.*, (1975) 3 SCC 395; AIR 1974 SC 2353; *Dharamdas v. Police Commr.*, (1989) 2 SCC 370; AIR 1989 SC 1282; *Sitaram Sugar Co. v. Union of India*, (1990) 3 SCC 223; AIR 1990 SC 1277.

8. *Noor Salman v. Union of India*, (1994) 1 SCC 381.

address itself to the question to which it must have regard. But having done so, it can reasonably consider other relevant factors.⁹

(e) Mixed considerations

(i) General

Sometimes, a peculiar situation arises. Here the order is not *wholly* based on extraneous or irrelevant considerations. It is based *partly* on relevant and existent considerations and *partly* on irrelevant or non-existent considerations. There is no uniformity in judicial pronouncements on this point. In some cases, it was held that the proceedings were vitiated,¹⁰ while in other cases, it was held that the proceedings were not held to be bad.¹¹ It is submitted that the proper approach is to consider it in two different situations:

- (a) Conclusions based on subjective satisfaction; and
- (b) Conclusions based on objective facts.

(ii) Conclusion based on subjective satisfaction

If the matter requires *purely* subjective satisfaction; e.g. detention matters, a strict view is called for, and if the order of detention is based on relevant and irrelevant considerations, it has to be quashed. The reason is very simple and obvious. It is very difficult for the court to say as to what extent the irrelevant (or non-existent) grounds have operated on the mind of the detaining authority and whether it would have passed the same order even without those irrelevant or non-existent grounds. In *Dwarka Das v. State of J & K*¹², setting aside the order of the detention which was based on relevant and irrelevant grounds, the Supreme Court observed: "Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent

9. *Sitaram Sugar Co. v. Union of India*, (1990) 3 SCC 223 (243-45); AIR 1990 SC 1277.

10. *Dhirajlal v. CIT*, AIR 1955 SC 271; (1954) 26 ITR 736; *Lal Chand v. CIT*, AIR 1959 SC 1295; (1960) 1 SCR 301.

11. *State of Orissa v. Bidyabhusan*, AIR 1963 SC 779; *State of Maharashtra v. Babulal Takkamore*, AIR 1967 SC 1353; *Pyare Lal Sharma v. J & K Ind. Ltd.*, (1989) 3 SCC 448; AIR 1989 SC 1854.

12. AIR 1957 SC 164; 1956 SCR 948.

or irrelevant, the court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. *To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the court for the subjective satisfaction of the statutory authority.*¹³ (emphasis supplied)

But the Court further stated:

“In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, *might reasonably have affected the subjective satisfaction of the appropriate authority*. It is not merely because some ground or reason of a *comparatively unessential nature* is defective that such an order based on subjective satisfaction can be held to be invalid. The court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders. It is in the light of these principles that the validity of the impugned order has to be judged.”¹⁴

(emphasis supplied)

It is respectfully submitted that these observations are unnecessary and very wide and do not lay down the correct law. They leave the courts to speculate. If the order is based on *subjective satisfaction* and if it is not permissible for the court (as the court itself conceded) ‘to substitute the objective standards of the court for the subjective satisfaction of the statutory authority’ one fails to see how the *objective standard* can be applied? It is therefore, submitted that in detention matters, the orders must necessarily be quashed if they are based on mixed considerations.¹⁵

Sometimes, the legislature itself provides that inspite of mixed considerations or relevant as well as irrelevant grounds, an order of detention shall be treated as legal and valid. For instance, Section 5-A of the National Security Act, 1980 enacts that when an order of detention is made on two or more grounds, it shall be deemed to have been made separately on each ground and it will not be deemed to be invalid or inoperative

13. *Id.* at p. 168 (AIR).

14. *Id.* at p. 168 (AIR); see also *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740; (1966) 1 SCR 709; *Manu Bhusan v. State of W.B.*, (1973) 3 SCC 663; AIR 1973 SC 295; *Pushker v. State of W.B.*, (1969) 1 SCC 10; AIR 1970 SC 852; *Fagu v. State of W.B.*, (1974) 4 SCC 501; AIR 1975 SC 245; *Kamlakar v. State of M.P.*, (1983) 4 SCC 443; AIR 1984 SC 211. For other cases, see C.K. Thakker: *Administrative Law*, 1996, p. 346.

15. For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 345-51.

merely because one or more of the grounds is or are non-existent, vague or irrelevant. Such provisions are held to be constitutional.¹⁶

(iii) Conclusion based on objective facts

If the conclusion of the authority is based on *objective facts* and the action is based on relevant and irrelevant considerations the court may apply the *objective standard* and decide the validity or otherwise of the impugned action.

Thus, in *State of Orissa v. Bidyabhusan*¹⁷, A was dismissed from service on certain charges. The High Court found that some of them were not proved and, therefore, directed the Government to consider the case whether on the basis of the remaining charges the punishment of dismissal was called for. On appeal, the Supreme Court reversed the judgment of the High Court and upheld the order of dismissal. According to the Supreme Court, if the order could be supported on any of the grounds, it was not for the court to consider whether on that ground alone the punishment of dismissal can be sustained.

Shah, J. (as he then was) rightly observed: "[I]f the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The court has no jurisdiction if the findings of the inquiry officer or the Tribunal *prima facie* make out a case of misdemeanour; to direct the authority to reconsider the order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice."¹⁸ (emphasis supplied)

Similarly, in *State of Maharashtra v. Babulal Takkamore*¹⁹, the State Government superseded the municipality on two grounds. One of them was held to be extraneous and yet the order was upheld as the court felt 'reasonably certain that the State Government would have passed the order on the basis of the second ground alone' as in the show-cause notice itself it was mentioned that the grounds 'jointly as well as severally' were serious enough to warrant action.

In *Pyare Lal Sharma v. J&K Industries Ltd.*²⁰, the services of the petitioner were terminated on two grounds: (i) unauthorised absence from

16. *Attorney-General v. Amritlal*, (1994) 5 SCC 54: AIR 1994 SC 2179. For detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 440-46.

17. AIR 1963 SC 779; 1963 Supp (1) SCR 648.

18. *Id.* at p. 786 (AIR).

19. AIR 1967 SC 1353; (1967) 2 SCR 583.

20. (1989) 3 SCC 448; AIR 1989 SC 1854; see also *Madhukar v. Hingwe*, (1987)

duty; and (ii) taking part in active politics. It was proved that no notice was issued to the delinquent regarding taking part in active politics. The Supreme Court, however, upheld the order by observing that 'the order of termination can be supported on the ground of remaining unauthorisedly absent from duty'.

(iv) Correct principle

It is submitted that the aforesaid view is correct. The principle has been succinctly laid down by Shelat, J. in *Zora Singh v. J.M. Tandon*²¹, wherein His Lordship observed:

"The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior court to find out which of the reasons, relevant or irrelevant, valid, or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. *If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior court would not interfere if the finding can be sustained on the rest of the evidence.*"²² (emphasis supplied)

(f) Mala fide

(i) General

Every power must be exercised by the authority reasonably and lawfully. However, it is rightly said, "every power tends to corrupt and absolute power corrupts absolutely". It is, therefore, not only the power but the duty of the courts to see that all authorities exercise their powers properly, lawfully and in good faith. If the power is not exercised *bona fide*, the exercise of power is bad and the action illegal.

(ii) Definition

Though precise and scientific definition of the expression "*mala fide*" is not possible, it means ill-will, dishonest intention or corrupt motive. A power may be exercised maliciously, out of personal animosity,

1 SCC 164; AIR 1987 SC 570.

21. (1971) 3 SCC 834; AIR 1971 SC 1537.

22. *Id.* at p. 838 (SCC); pp. 1540-41 (AIR); see also *Union of India v. Parma Nanda*, (1989) 2 SCC 177; AIR 1989 SC 1185.

ill-will or vengeance or fraudulently and with intent to achieve an object foreign to the statute.²³

(iii) Types

From the above definition, it can be said that malice is of two types: (1) express malice or "malice in fact", and (2) implied or legal malice or "malice in law". *Mala fides* violating proceedings may be factual or legal. Former is actuated by extraneous considerations whereas the latter arises where a public authority acts deliberately in defiance of law, may be, without malicious intention or improper motive.²⁴ In other words, a plea of *mala fide* involves two questions; (i) whether there is a personal bias or oblique motive; and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of power.²⁵

(A) Malice in fact

When an administrative action is taken out of personal animosity, ill-will, vengeance or dishonest intention, the action necessarily requires to be struck down and quashed.

Thus, in *Pratap Singh v. State of Punjab*²⁶, the petitioner was a civil surgeon and he had taken leave preparatory to retirement. Initially the leave was granted, but subsequently it was revoked. He was placed under suspension, a departmental inquiry was instituted against him and, ultimately, he was removed from service. The petitioner alleged that the disciplinary proceedings had been instituted against him at the instance of the then Chief Minister to wreak personal vengeance on him as he had not yielded to the illegal demands of the former. The Supreme Court accepted the contention, held the exercise of power to be *mala fide* and quashed the order.

Similarly, in *Rowjee v. State of A.P.*²⁷, the State Road Transport Corporation had framed a scheme for nationalisation of certain transport routes. This was done as per the directions of the then Chief Minister. It was alleged by the petitioner that the particular routes were selected to take vengeance against the private transport operators of that area as

23. de Smith: *Judicial Review of Administrative Action*, 1995, pp. 344-46; *Jai Chand v. State of W.B.*, AIR 1967 SC 483; 1966 Supp SCR 464; *Venkataraman v. Union of India*, (1979) 2 SCC 491; AIR 1979 SC 49.

24. *State of Maharashtra v. Budhikota*, (1993) 3 SCC 71 (78); 1993 SCC (Cri) 597.

25. *State of Bihar v. P.P. Sharma*, 1992 Supp (1) SCC 222 (260); AIR 1991 SC 1260 (1278-79).

26. AIR 1964 SC 72; (1964) 4 SCR 733.

27. AIR 1964 SC 962; (1964) 6 SCR 330.

they were his political opponents. The Supreme Court upheld the contention and quashed the order.

In *Shivajirao Patil v. Mahesh Madhav*²⁸, in a writ petition, it was alleged that altering and tampering with the mark-sheet had been done in favour of A, daughter of the then Chief Minister of Maharashtra at M.D. Examination at the behest of the Chief Minister. Though there was no direct evidence about the fact, from various circumstances, the court held that such alteration had been made by the person conducting the examination at the behest of the then Chief Minister. Mukharji, J. (as he then was) rightly observed: "This court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards is an equally grave menace as the pollution of the environment. *Where such situations cry out the courts should not and cannot remain mute and dumb.*"²⁹ (emphasis supplied)

On the other hand, in *State of Haryana v. Bhajan Lal*³⁰, a complaint regarding corruption was filed against the former Chief Minister. The High Court under Article 226 of the Constitution quashed the proceedings *inter alia* observing that they were initiated due to political vendetta and were tainted with personal *mala fides*. The Supreme Court quashed the order of the High Court.

(B) *Malice in law*

When an action is taken or power is exercised without just or reasonable cause or for purpose foreign to the statute, the exercise of power would be bad and the action *ultra vires*.

In *Municipal Council of Sydney v. Campbell*³¹, under the relevant statute the Council was empowered to acquire land for "carrying out improvements in or remodelling any portion of the city". The Council acquired the disputed land for expanding a street. But in fact the object was to get the benefit of probable increase in the value of land as a result of the proposed extension of the highway. No plan for improving or remodelling was proposed or considered by the Council. It was held that the power was exercised with ulterior object and hence it was *ultra vires*.

28. (1987) 1 SCC 227; AIR 1987 SC 294.

29. *Id.* at p. 253 (SCC); 311 (AIR).

30. 1992 Supp (1) SCC 335; AIR 1992 SC 604.

31. (1925) AC 338; (1924) All ER 930.

Similarly, in the well-known case of *Express Newspapers (P) Ltd. v. Union of India*³², a notice of re-entry upon forfeiture of lease granted by the Central Government and of threatened demolition of the Express Buildings was held to be *mala fide* and politically motivated by the party in power against the Express Group of Newspapers in general and Ram Nath Goenka, Chairman of the Board of Directors, in particular.

In *State of Haryana v. Bhajanlal*³³, however, an action of launching prosecution against the Chief Minister under the provisions of the Prevention of Corruption Act, 1947 was not held to be *mala fide* and the proceedings were not quashed. Likewise in *T.N. Sheshan v. Union of India*³⁴, the President of India, by an Ordinance made the Election Commission a multi-member Commission. The said action was challenged by the petitioner as *mala fide*. Holding the Ordinance constitutional, the Supreme Court observed that the action was not vitiated by malice in law.

(iv) Test

Two important factors will throw considerable light in determining whether a decision is *mala fide* or motivated by improper considerations; (i) first relates to the manner or method of reaching the decision; and (ii) second to the circumstances in which the decision is taken and the considerations which have entered into in reaching that decision.³⁵ It is difficult to establish *mala fide* in a straight-cut manner. In appropriate cases, the court may draw an inference of *mala fide* action from pleadings and antecedent circumstances. Such inference must be based on foundation of facts, pleaded and proved. An inference of *mala fide* cannot be drawn on insinuation and vague allegations.³⁶

(v) Burden of proof

The burden of proving *mala fide* is on the person making the allegations, and the burden is 'very heavy'.³⁷ Neither express nor implied malice can be inferred or assumed.³⁸ It is for the person seeking to invalidate an order to establish the charge of bad faith. The reason is simple

32. (1986) 1 SCC 133: AIR 1986 SC 872.

33. 1992 Supp (1) SCC 335: AIR 1992 SC 604.

34. (1994) 4 SCC 611.

35. *State of M.P. v. Nandlal*, (1986) 4 SCC 566 (612): AIR 1987 SC 251.

36. *Rajendra Roy v. Union of India*, (1993) 1 SCC 148: AIR 1993 SC 1234.

37. *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 (41): AIR 1974 SC 555 (586); *Gulam Mustafa v. State of Gujarat*, (1976) 1 SCC 800 (801-02): AIR 1977 SC 448 (448-49); *Kedar Nath v. State of Punjab*, (1978) 4 SCC 336 (339): AIR 1979 SC 220 (227); *Shivajirao Patel v. Mahesh Madhav*; (*supra*).

38. *State of Maharashtra v. Budhikota*, (1993) 3 SCC 71 (78): 1993 SCC (Cri) 597.

and obvious. There is presumption in favour of the administration that it always exercises its power *bona fide* and in good faith. It is to be remembered that the allegations of *mala fide* are often more easily made than made out, and the very seriousness of such allegations demands proof of a high order of credibility. *It is the last refuge of a losing litigant.*³⁹ (emphasis supplied)

(vi) Counter-affidavit

It is settled law that the person against whom personal *mala fides* or 'malice in fact' is imputed should be impleaded *eo nomine* as a party respondent and should be afforded opportunity to meet with those allegations.⁴⁰ It is, however, not necessary to make allegations against a named official.⁴¹ But when definite allegations have been made and necessary and sufficient particulars in support of such allegations have been furnished by the petitioner in the petition, it is obligatory on the part of the respondent to deal with them by filing a counter-affidavit. In the absence of a denial affidavit by the person against whom such allegations are made, the court may accept those allegations as correct on the test of probability.⁴²

(vii) Summary dismissal

When serious allegations of *mala fides* have been made by the petitioner in the petition, the court may not dismiss the petition *in limine* without issuing notice to the respondent.⁴³ No doubt the court would be justified in refusing to carry out investigation by making a roving inquiry if sufficient particulars making out a *prima facie* case are not included in the petition.⁴⁴ But the court must consider the totality of the circumstances and not each allegation individually and independently for deciding whether the impugned action is *mala fide*.⁴⁵

39. Per Krishna Iyer, J. in *Gulam Mustafa v. State of Gujarat*, (1976) 1 SCC 800 (802); AIR 1977 SC 448 (449).

40. *State of Bihar v. P.P. Sharma*, 1992 Supp (1) SCC 222; AIR 1991 SC 1260 (1279-80).

41. *State of Punjab v. Ramji Lal*, (1970) 3 SCC 602; AIR 1971 SC 1228.

42. *R.P. Kapoor v. Sardar Pratap Singh*, AIR 1961 SC 1117(1125); (1961) 2 SCR 143; *Pratap Singh v. State of Punjab*, AIR 1964 SC 72 (83); (1964) 4 SCR 733; *Rowjee v. State of A.P.*, AIR 1964 SC 962 (969-70); (1964) 6 SCR 330; *Hem Lall v. State of Sikkim*, (1987) 2 SCC 9(12); AIR 1987 SC 762(765).

43. *British India Corpn. v. Industrial Tribunal, Punjab*, AIR 1957 SC 354(356); *Gian Chand v. State of Haryana*, (1970) 3 SCC 270; *D.D. Suri v. A.K. Barren*, (1970) 3 SCC 313; AIR 1971 SC 175; *Hem Lall v. State of Sikkim (Id.)*.

44. *E.P. Royappa*, (*supra*); *Tara Chand v. Delhi Municipal Corpn.*, (1977) 1 SCC 472 (484); AIR 1977 SC 567 (577); *Hem Lall*, (*Id.*).

45. *State of Haryana v. Rajendra Sareen*, (1972) 1 SCC 267 (282-83); AIR 1972

(viii) Legislative power and mala fides

It is well-established that an executive action can be challenged on the ground of *mala fide* exercise of power. A question may, however, arise: whether a pure legislative or quasi-legislative act can be challenged on such ground? The decisions of the Supreme Court are not uniform on that point. In some cases, it was held that legislative action can be impugned on the ground of malice in law, whereas in other cases, a contrary view has been taken. It is submitted that the former view is correct and is in consonance with the doctrine of judicial review which is the basic structure of the Constitution.⁴⁶

(g) Improper object: Collateral purpose

A statutory power conferred on the authority must be exercised for that purpose alone and if it is exercised for a different purpose, there is abuse of power by the authority and the action may be quashed. Improper purpose must be distinguished from '*mala fide*' exercise of power. In the latter, personal ill-will, malice or oblique motive is present, while in the former it may not be so, and the action of the authority may be *bona fide* and honest and yet, if it is not contemplated by the relevant statute, it may be set aside. In other words, "a power used under the misapprehension that it was needed for effectuating a purpose, which was really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose".⁴⁷

In the leading American case of *Nader v. Bork*⁴⁸, by revoking a regulation, Cox, Watergate Special Prosecutor was relieved by the Attorney-General by abolishing that office. However, within few days, once again, the regulation was reinforced. The court held the revocation illegal since "it was simply a ruse to permit the discharge of Cox, a purpose that could never be legally accomplished with the original regulation in effect".

In *Nalini Mohan v. District Magistrate*⁴⁹, the relevant statute empowered the authority to rehabilitate the persons displaced from Pakistan as a result of communal violence. That power was exercised to accom-

SC 1004 (1016).

46. For detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 452-58.

47. *State of Mysore v. P.R. Kulkarni*, (1973) 3 SCC 597 (600); AIR 1972 SC 2170 (2172); *Pratap Singh v. State of Punjab*, AIR 1964 SC 72; (1964) 4 SCR 733.

48. (1973) 366 F Supp 104.

49. AIR 1951 Cal 346.

moderate a person who had come from Pakistan on medical leave. The order was set aside.

Likewise, in *State of Bombay v. K.P. Krishnan*⁵⁰, the Government refused to make a reference on the ground that 'the workmen resorted to go slow during the year'. The Supreme Court held that the reason was not germane to the scope of the Act and set aside the order.⁵¹

In *Bangalore Medical Trust v. Muddappa*⁵², a piece of land earmarked for a public park was allotted at the instance of the then Chief Minister to a private trust for construction of nursing home. It was contended that the action was taken in public interest and the local authority would get income. The Supreme Court, however, held that the "exercise of power was contrary to the purpose for which it was conferred under the statute".

In *Forward Construction Co. v. Prabhat Mandal*⁵³, a plot was reserved for a bus depot under the Development Plan. A substantial portion of the plot was utilised for the bus depot whereas a part thereof was allowed to be used for commercial purpose. The Supreme Court, in these circumstances, held that it could not be said that the plot had been used for a different purpose from the one for which it had been acquired.

(h) Colourable exercise of power

Where a power is exercised by the authority ostensibly for the purpose for which it was conferred, but in reality for some other purpose, it is called colourable exercise of power. Here, though the statute does not empower the authority to exercise the power in a particular manner, the authority exercises the power under the 'colour' or guise of legality.

Similarly, where the legislature enacts law on assumption that it has legislative power to legislate and ultimately it is found that it has no such power or competence, such enactment is called a 'colourable legislation'.⁵⁴

In the leading case of *Somavanti v. State of Punjab*⁵⁵, interpreting the provisions of the Land Acquisition Act, 1894, the Supreme Court observed: "If the purpose for which the land is being acquired by the

50. AIR 1960 SC 1223: (1961) 1 SCR 227.

51. For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 360-62.

52. (1991) 4 SCC 54: AIR 1991 SC 1902.

53. (1986) 1 SCC 100: AIR 1986 SC 391.

54. *S.S. Bola v. B.D. Sardana*, (1997) 8 SCC 522: AIR 1997 SC 3127 (3183).

55. AIR 1963 SC 151 (164): (1963) 2 SCR 774.

State is within the legislative competence of the State, the declaration of the Government will be final, subject, however, to one exception. That exception is that *if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party.*'
(emphasis supplied)

In *Vora v. State of Maharashtra*⁵⁶, the State Government requisitioned the flat of the petitioner, but in spite of repeated requests of the petitioner, it was not derequisitioned. Declaring the action bad the court observed that though the act of requisition was of a transitory character, the Government in substance wanted the flat for permanent use, which would be a 'fraud upon the statute'.

In *D.C. Wadhwa v. State of Bihar*⁵⁷, the Supreme Court quashed the action of the State of Bihar of issuing promulgation of Ordinances on a large scale being a fraud on the Constitution.

In *R.S. Joshi v. Ajit Mills*⁵⁸, the relevant statute provided that if any person collected tax from any buyer on a tax-free item, the said sum was liable to forfeiture by the State. Describing the provision as incidental and ancillary, the Supreme Court negatived the contention that there was colourable exercise of power by the State Legislature.

But it is very difficult to draw a dividing line between improper or collateral purpose on the one hand and colourable exercise of power on the other. It is obvious that if the statutory power is exercised for an 'improper' or 'collateral' purpose, there is 'colourable' exercise of power. Similarly, if there is 'colourable' exercise of power, it cannot be said that it was exercised for proper purpose. Thus, both the phrases can be used interchangeable.

One thing, however, should not be forgotten. The legislature is one of the three organs of the State; others being the executive and the judiciary. And, therefore, judiciary must think twice before holding a legislative provision as fraud on the Constitution or colourable exercise of power by the legislature (the coordinate organ of the State).⁵⁹

56. (1984) 2 SCC 337; AIR 1984 SC 866; see also *S.S. Bola v. B.D. Sardana*, (1997) 8 SCC 522; AIR 1997 SC 3127(3183).

57. (1987) 1 SCC 378; AIR 1987 SC 579.

58. (1977) 4 SCC 98; AIR 1977 SC 2279; see also *Gajapati v. State of Orissa*, AIR 1953 SC 375; 1954 SCR 1; *Vajravelu v. Sp. Dy. Collector*, AIR 1965 SC 1017; (1965) 1 SCR 614; *Ashok Kumar v. Union of India*, (1991) 3 SCC 498; AIR 1991 SC 1792.

59. *R.S. Joshi v. Ajit Mills*, (1977) 4 SCC 98 (108); AIR 1977 SC 2279 (2286); see also V.G. Ramachandran: *Law of Writs*, 1993, pp. 471-77.

(i) Non-observance of natural justice

By now, it is well-settled law that even if the exercise of power is purely administrative in nature, if it adversely affects any person, the principles of natural justice must be observed and the person concerned must be heard. Violation of the principles of natural justice makes the exercise of power *ultra vires* and void.⁶⁰

(j) Unreasonableness**(i) General**

A discretionary power conferred on an administrative authority must be exercised by that authority reasonably. If the power is exercised unreasonably, there is an abuse of power and the action of the authority will be *ultra vires*.

The term 'unreasonable' is ambiguous and may include many things, e.g. irrelevant or extraneous considerations might have been taken into account by the authority or there was improper or collateral purpose or *mala fide* exercise of power by it or there was colourable exercise of power by the authority and the action may be set aside by courts.

(ii) Meaning

But the difficult question is: what do we mean by the expression 'reasonable'? It would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The word 'reasonable' has in law the *prima facie* meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know.⁶¹

Similarly, the term 'unreasonable' may include many things, e.g. irrelevant or extraneous considerations might have been taken into account by the authority or there was improper or collateral purpose or *mala fide* exercise of power by it or there was colourable exercise of power by the authority and the action may be set aside by courts. Thus, the expression "unreasonableness" covers a multitude of sins.⁶²

(iii) Ambit and scope

The concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.⁶³ Judicial review of administrative

60. For detailed discussion see Lecture VI (*supra*).

61. *A Solicitor, Re*, (1945) KB 368 (371).

62. Wade: *Administrative Law*, 1994, p. 411; see also *Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91; AIR 1991 SC 1153.

63. *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; AIR 1984 SC 802.

action is a basic feature of the Constitution. But at the same time it is also to be remembered that "an application for judicial review is not an appeal". If the scope of such review is too broad, it will destroy the autonomy of independent agencies, on the other hand, if it is too narrow, it will make the doctrine of judicial review a "hopeless formality". A court cannot take the place of the body to whom Parliament has entrusted the power to decide. But if such a decision is arbitrary, unlawful, *ultra vires* or unreasonable, the court can and must interfere.⁶⁴

(iv) *Leading cases*

In the leading case of *Roberts v. Hopwood*⁶⁵, the local authority was empowered to pay "such wages as it may think fit". In exercise of this power, the authority fixed the wages at £ 4 per week to the lowest grade worker in 1921-22. The court held that though discretion was conferred, it was not exercised reasonably and the action was bad. According to Lord Wrenbury, 'may think fit' means 'may reasonably think fit'. His Lordship observed: "Is the verb 'think' equivalent to 'reasonably think'? My Lords, to my mind there is no difference in the meaning, whether the word 'reasonably' or 'reasonable' is in or out ... I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so — he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. *He must act reasonably.*" (emphasis supplied)

In *Rohtas Industries Ltd. v. S.D. Agrawal*⁶⁶, an order of investigation was issued by the Central Government against the petitioner company under the Companies Act, 1956. The Supreme Court set aside the order. Hegde, J. rightly stated: "We do not think that any reasonable person much less any expert body like the Government on the material before it, could have jumped to the conclusion that there was any fraud involved in the sale of the shares in question.... *The opinion formed by the Government was a wholly irrational opinion.*" (emphasis supplied)

64. *G.B. Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91: AIR 1991 SC 1153; *Tata Cellular v. Union of India*, (1994) 6 SCC 651: AIR 1996 SC 11.

65. (1925) AC 578 (613); (1925) All ER 24: 94 LJ KB 542.

66. (1969) 1 SCC 325: AIR 1969 SC 707 (719-20).

In *Pukhraj v. Kohli*⁶⁷, under Section 178-A of the Customs Act, 1878, the burden of proof that the goods are not smuggled goods is on the person from whom they are seized in the 'reasonable belief' that they are smuggled goods. The Supreme Court took a narrow view and held that it was not sitting in appeal over the decision of the authority and all that was necessary was the *prima facie* ground about the reasonable belief.

But in *Sheonath v. Appellate Asstt. Commr.*⁶⁸, the court held that the expression 'reason to believe' suggests that the belief must be that of an honest and reasonable person based upon reasonable grounds and not on mere suspicion.

(v) Test

The difficulty, however, is: what is the test for unreasonableness? By whose standards can "reasonableness" be decided? In different fields and in different situations, the meaning of reasonableness differs. Moreover, the test of reasonableness in Administrative Law is different from the test of reasonableness familiar to the Law of Torts. The concept of reasonableness of restrictions on the Fundamental Rights under Part III of the Constitution is yet another area and different considerations must be applied.⁶⁹

(vi) Burden of proof

The onus of proof that the decision of the authority is unreasonable is on the petitioner who challenges such decision as unreasonable. It is, however, open to a court to inquire as to whether a reasonable man could have come to a decision in question without misdirecting himself or the law or the facts in material respects. If the court comes to a conclusion that the decision is so unreasonable that no reasonable man could ever have come to it, the court can interfere.⁷⁰

(vii) Conclusions

At the same time, however, an action of the authority cannot be held to be unreasonable merely because the court thinks it to be unreasonable.⁷¹ Two reasonable persons can reasonably come to opposite conclu-

67. AIR 1962 SC 1559; 1962 Supp (3) SCR 866.

68. (1972) 3 SCC 234; AIR 1971 SC 2451.

69. *G.B. Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91 (109-10); AIR 1991 SC 1153 (1164).

70. *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (100); *Tata Cellular v. Union of India*, (1994) 6 SCC 651 (679); AIR 1996 SC 11; *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405 (418); AIR 1996 SC 1356.

71. *Kruse v. Johnson*, (1898) 2 QB 91 (100); 46 WR 630 (per Lord Russell).

sions on the same set of facts without forfeiting their title to be regarded as reasonable.⁷² The court cannot sit in appeal over the decision of the administrative authority. It can interfere only if the decision is 'so unreasonable that no reasonable man could have ever come to it', or is 'perverse' or there is 'no evidence' to justify the conclusion. "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it",⁷³ or in the words of Lord Scarman, the decision is so absurd that one is satisfied that the decision-maker 'must have taken leave of his senses'.⁷⁴

13. DOCTRINE OF PROPORTIONALITY

(a) General

With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, unreasonable or irrational, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power is the doctrine of proportionality.

(b) Doctrine explained

In *Council of Civil Service Unions v. Minister for Civil Service*,⁷⁵ Lord Diplock observed:

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. *I have in mind particularly the possible adoption in the future of the principle of 'proportionality'*"⁷⁶

(emphasis supplied)

72. Per Lord Hailsham in *An Infant, Re*, (1971) AC 682 (700).

73. *Council of Civil Service Unions v. Minister for the Civil Service*, (1985) AC 374 (410); (1984) 3 All ER 935 (Per Lord Diplock).

74. *Nottinghamshire County Council v. Secy. of State*, (1986) AC 240 (247); (1986) 1 All ER 199 (207).

75. (1984) 3 All ER 935; (1984) 3 WLR 1174; (1985) AC 374.

76. *Id.* at p. 950 (All ER); 408 (AC). See also *R. v. Secy. of State*, 1986 AC 240.

Proportionality is “concerned with the way in which the decision-maker has ordered his priorities, the very essence of decision-making consists in the attribution of relative importance to the factors in the case”. In the human rights context, proportionality involves a ‘balancing test’ and the ‘necessity test.’ The former scrutinises excessive and onerous penalties or infringement of rights or interest whereas the latter takes into account other less restrictive alternatives.⁷⁷

(c) Nature and scope

The doctrine ordains that administrative measures must not be more drastic than is necessary for attaining the desired result. If an action taken by an authority is grossly disproportionate, the said decision is not immune from judicial scrutiny. Apart from the fact that it is improper and unreasonable exercise of power, it shocks the conscience of the court and amounts to evidence of bias and prejudice.⁷⁸

(d) Illustrative cases

Let us consider some cases on the point.

In *Hind Construction Co. v. Workman*,⁷⁹ some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. Confirming the order of the tribunal, the Supreme Court observed that the absence could have been treated as leave without pay. The workman might have been warned and fined. “*It is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner.*”

(emphasis supplied)

In *Ranjit Thakur v. Union of India*,⁸⁰ an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment. The said order was challenged *inter alia* on the ground that the punishment was grossly disproportionate. Upholding the contention, following *Council of Civil Service Unions*, and emphasising that “all

77. *Union of India v. G. Ganayatham*, (1997) 7 SCC 463.

78. Wade: *Administrative Law*, (1994), p. 403; *Council of Civil Service Unions v. Minister for Civil Service*, (*supra*).

79. AIR 1965 SC 917(919-20); (1965) 2 SCR 85.

80. (1987) 4 SCC 611; AIR 1987 SC 2386.

powers have legal limits'', Venkatachaliah, J. (as he then was) rightly observed:

''The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. *The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.*''⁸¹ (emphasis supplied).

In *Sardar Singh v. Union of India*,⁸² a jawan serving in an Indian Army was granted leave and while going to his home town, he purchased eleven bottles of rum from army canteen though he was entitled to carry only four bottles. In court martial proceedings, he was sentenced to undergo R.I for three months and was also dismissed from service. His petition under Article 226 of the Constitution was dismissed by the High Court. The petitioner approached the Supreme Court. Holding the action arbitrary and punishment severe, the Court set aside the order.

In *Union of India v. Parma Nanda*,⁸³ however, the Supreme Court took a very narrow view. In that case, an employee was charge-sheeted alongwith two other employees for preparing false pay bills and bogus identity card. In inquiry all of them were found guilty. A minor punishment was imposed on two employees, but the petitioner was dismissed from service, since he was 'master-mind' behind the plan. His application before the Central Administrative Tribunal was partly allowed and the penalty was reduced in the line of two other employees. Union of India approached the Supreme Court. The appeal was heard by a Division Bench of three Judges. Allowing the appeal, setting aside the judgment of the Tribunal and considering the decision in *State of Orissa v. Bidyabhushan Mahapatra*,⁸⁴ and other cases⁸⁵ and making wider observations, the Court stated:

81. *Id.* at p. 620 (SCC): 2392 (AIR).

82. (1991) 3 SCC 213; AIR 1992 SC 417.

83. (1989) 2 SCC 177; AIR 1989 SC 1185.

84. AIR 1963 SC 779; 1963 Supp (1) SCR 648.

85. *Dhirajlal v. CIT*, AIR 1955 SC 271; *State of Maharashtra v. B.K. Takkamore*, AIR 1967 SC 1353; (1967) 2 SCR 583; *Zora Singh v. J.M. Tandon*, (1971) 3

“If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is mala fide is certainly not a matter for the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the Inquiry Officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter.”⁸⁶ (emphasis supplied)

It is submitted that the observations made by the Supreme Court did not lay down the correct law inasmuch as, the doctrine of proportionality in awarding punishment has been recognised by the Indian Courts since long. It is no doubt true that in the facts and circumstances of the case, the punishment awarded to the petitioner could not be said to be excessively high or grossly disproportionate to the charges levelled and proved against him, wider observations were unnecessary. If the punishment imposed on employee is excessively harsh or disproportionate, a High Court or the Supreme Court, in exercise of the powers under Articles 32, 226, 136 and 227 of the Constitution of India, can interfere with it. If the Central Administrative Tribunal could be said to be ‘substitute’ of a High Court which position was conceded even by the Supreme Court, the Tribunal undoubtedly possessed power to interfere with the order of punishment.

Again, in *Union of India v. G. Ganayatham*,⁸⁷ on proved misconduct of an employee, 50% pension and 50% gratuity were withheld. The Central Administrative Tribunal reduced the penalty. Holding that the scope of judicial review in such matters is very limited, the Supreme Court quashed the order of the Tribunal and upheld the action taken by the authorities.

Relying upon *Council of Civil Service Unions and Wednesbury Corpn.*,⁸⁸ the court rightly observed that in such matters the role of the court is secondary. Ordinarily, the court of law would not interfere with the punishment imposed by the administrative authorities unless it is unreasonable, irrational or out of proportion. Even in those cases as a general rule, the matter has to be remitted back to the appropriate auth-

SCC 834: AIR 1971 SC 1537.

86. (1989) 2 SCC 177 (189): AIR 1989 SC 1185 (1192-93).

87. (1997) 7 SCC 463.

88. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1947) 2 All ER 680: (1948) 1 KB 223.

ority for reconsideration and only in very rare cases to shorten litigation, it can substitute its own view on quantum of punishment.

(e) Proportionality and reasonableness

It is clear that the principles of reasonableness and proportionality cover a great deal of common ground.⁸⁹ Even prior to the leading decision in *Council of Civil Service Unions v. Minister for the Civil Service*,⁹⁰ the reasoning was applied in a number of cases by the Supreme Court. Thus, if a trader's licence is cancelled for a minor irregularity, it can be quashed either on the ground that the penalty is 'disproportionate' or is 'unreasonable'.⁹¹ Such an action can also be held to be arbitrary as observed in *Sardar Singh v. Union of India*.⁹²

(f) Conclusions

The doctrine of proportionality, as a part of judicial review ensures that a decision otherwise within the province of administrative authority must not be arbitrary, irrational or unreasonable. Though in judicial review the court is not concerned with the correctness of the decision but the way in which the decision is taken, the very decision-making process involves attributing relative importance to various aspects in the case and there the doctrine of proportionality enters.

It is submitted that the following observations of Lord Diplock in *R. v. Goldstein*,⁹³ lay down the correct law on the point, and therefore, are worth quoting;

"What is therefore needed is a preparedness to hold that a decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be disproportionate to the aims and view. . . The deployment of proportionality sets in focus the true nature of the exercise; the elaboration of a rule about permissible priorities."⁹⁴

14. DOCTRINE OF LEGITIMATE EXPECTATIONS

(a) General

The doctrine of "legitimate expectations" has been recently recognised in the English as well as in the Indian legal system. It is the 'latest

89. Wade: *Administrative Law*, (1994), p. 403.

90. (1984) 3 All ER 935; (1984) 3 WLR 1174; (1985) AC 374.

91. *R. v. Barnsley*, (1976) 1 WLR 1052.

92. (1991) 3 SCC 213; AIR 1992 SC 417.

93. (1983) 1 All ER 434; (1983) 1 WLR 151.

94. *Id.* at p. 157 (WLR); see also *Union of India v. G. Ganayatham*, (1997) 7 SCC 463.

recruit' to a long list of concepts fashioned by the courts for the review of administrative actions. The doctrine has an important place in the development of law of judicial review.⁹⁵

(b) Nature and scope

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment.

Where a decision of an administrative authority adversely affects legal rights of an individual, duty to act judicially is implicit. But even in cases where there is no legal right, he may still have legitimate expectation of receiving the benefit or privilege. Such expectation may arise either from express promise or from existence of regular practice which the applicant can reasonably expect to continue. In such cases, the court may protect his expectation by invoking principles analogous to natural justice and fair play in action. The Court may not insist an administrative authority to act *judicially* but may still insist him to act *fairly*.⁹⁶

(c) Object

Principles of natural justice will apply in cases where there is some right which is likely to be affected by an act of administration. Good administration, however, demands observance of doctrine of reasonableness in other situations also where the citizens may legitimately expect to be treated fairly.

A doctrine of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice.

(d) Doctrine explained

In the leading case of *Attorney General of Hong Kong v. Ng Yuen Shiu*,⁹⁷ Lord Fraser stated: "When a public authority has promised to follow a certain procedure, it is in the interest of good administration

95. *Westminster City Council, Re*, (1986) AC 668; (1986) 2 All ER 278, *Findlay v. Secy. of State*, (1984) 3 All ER 801; 1985 AC 318; *Union of India v. Hindustan Dev. Corpn.*, (1993) 3 SCC 499; AIR 1994 SC 980; *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509.

96. *Schmidt v. Secy. of State*, (1969) 1 All ER 904, 914; (1969) 2 WLR 337; (1969) 2 Ch D 149; *Attorney-General of Hong Kong v. Ng Yuen Shiu*, (1983) 2 All ER 346; (1983) 2 WLR 735; (1983) 2 AC 629; *Council of Civil Service Unions v. Minister for Civil Service*, (1984) 3 All ER 935; (1984) 3 WLR 1174; (1985) AC 374; *Halsbury's Laws of England*, 4th Edn., Vol. 1(I), p. 151.

97. (1983) 2 All ER 346; (1983) 2 AC 629.

that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty.”

Wade¹ also states:

“In many cases legal rights are affected, as where property is taken by compulsory purchase or someone is dismissed from a public officer. But in other cases, the person affected may have no more than an interest, a liberty or an expectation . . . ‘legitimate expectation’ which means reasonable expectation, can equally well be invoked in any of many situations where fairness and good administration justify the right to be heard.”

(e) Development

The concept of legitimate expectation made its first appearance in *Schmidt v. Secy. of State*,² wherein it was held that an alien who was granted leave to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period.

The doctrine was reiterated when alien students were refused extension of their permits as an act of policy by the Home Secretary. The Court of Appeal held that though the students had no right for extension, revocation of permits would be contrary to ‘legitimate expectation’.³

(f) Illustrations

The promise of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. A promise to confer, or past practice of conferring a substantive benefit, may give rise to an expectation that the individual will be given a hearing before a decision is taken not to confer the benefit. The actual enjoyment of a benefit may create a legitimate expectation that the benefit will not be removed without the individual being given a hearing. On occasions, individuals seek to enforce the promise or expectation itself, by claiming that the substantive benefit be conferred. *Decisions affecting such legitimate expectations are subject to judicial review.*⁴ (emphasis supplied)

1. *Administrative Law*, (1994), pp. 522-25, 418-20.

2. (1969) 1 All ER 904; (1969) 2 Ch D 149.

3. *R. v. Home Secretary*, (1984) 1 WLR 1337.

4. Clive Lewis: *Judicial Remedies in Public Law*, p. 97, cited in *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509, 526(544).

(g) Leading cases

In *Attorney General of Hong Kong v. Ng Yuen Shiu*⁵ the government announced that illegal immigrants would not be deported till their cases would be considered individually on merits. A deportation order was passed against the applicant without affording opportunity. Quashing the order, the Court observed:

“When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.”

In *Breen v. Amalgamated Engg. Union*,⁶ Lord Denning stated that if a person seeks a privilege to which he has no claim, he can be turned away without a word. He need not be heard. But if he is deprived of his livelihood, he should be afforded a hearing. Likewise, if he has some right of interest, or legitimate expectation, of which it would not be fair to deprive him without hearing, then he should be afforded hearing.

In *Navjyoti Coop. Group Housing Society v. Union of India*,⁷ as per the policy of the government, allotment of land to housing society was to be given on the basis of “First come first served”. It was held that the societies who had applied earlier could invoke the doctrine of ‘legitimate expectation’.

In *Supreme Court Advocates-on-Record Assn. v. Union of India*,⁸ the Supreme Court held that in recommending appointment to the Supreme Court, due consideration of every legitimate expectation has to be observed by the Chief Justice of India. “Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority.”

(h) Consequences

The existence of a legitimate expectation may have a number of consequences. It may give *locus standi* to a claimant to seek leave to apply for judicial review; it may mean that the authority ought not to act so as to defeat that expectation without justifiable cause. It may also mean that before defeating a person's legitimate expectation, the auth-

5. (1983) 2 All ER 346: (1983) 2 WLR 735: (1983) 2 AC 629.

6. (1971) 1 All ER 1148: (1971) 2 QB 175.

7. (1992) 4 SCC 477: AIR 1993 SC 155.

8. (1993) 4 SCC 441(703): AIR 1994 SC 268(437) (Verma, J.).

ority should afford him an opportunity of making representation on the matter. The claim based on the principle of legitimate expectation can be sustained and the decision resulting in denial of such expectation can be questioned provided the same is found to be unfair, unreasonable, arbitrary or violative of principles of natural justice.⁹

(i) Legitimate expectation and estoppel

Although there is some similarity between the two doctrines, and arguments under the label of 'estoppel' and 'legitimate expectation' are substantially the same, both the doctrines are distinct and separate. The element of acting to applicant's detriment which is a *sine qua non* for invoking estoppel is not a necessary ingredient of legitimate expectation.¹⁰

Duty of applicant

Legitimate expectation affords the applicant standing to apply for judicial review. A person who bases his claim on the doctrine of legitimate expectation in the first instance, must satisfy that there is a foundation for such claim.¹¹

(k) Duty of authority

Where the applicant *prima facie* satisfies the court that his claim on the basis of legitimate expectation is well founded, it is for the authority to justify the action taken against the applicant.¹²

(l) Duty of court

When a case of legitimate expectation is made out by the applicant, the Court will consider the prayer of the applicant for grant of relief. The protection of legitimate expectation does not require the fulfilment of the expectation where public interest requires otherwise. The court may uphold the decision taken by the authority on the basis of overriding public interest. Thus, protection of doctrine of legitimate expectation and grant of relief in favour of the claimant are two distinct and separate matters and presence of former does not necessarily result in the latter.¹³

9. *Halsbury's Laws of England*, 4th Edn., Vol. 1 (I), p. 151, see also *Union of India v. Hindustan Dev. Corpn.*, (1993) 3 SCC 499; AIR 1994 SC 980; *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509.

10. Wade: *Administrative Law*, (1994), p. 419-20; *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509(527).

11. *Union of India v. Hindustan Dev. Corpn.*, (1993) 3 SCC 499; AIR 1994 SC 980; *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509.

12. *Ibid.*

13. *Ibid.*

(m) Limitations

The doctrine of 'legitimate expectation', has its own limitations.

The concept of legitimate expectation is only procedural and has no substantive impact. In *Attorney General for New South Wales v. Quin*,¹⁴ one Q was a stipendiary Magistrate in charge of Court of Petty Sessions. By an Act of Legislature that court was replaced by Local Court. Though applied, Q was not appointed under the new system. That action was challenged. The Court dismissed the claim observing that if substantive protection is to be accorded to legitimate expectations, it would result in interference with administrative decisions on merits which is not permissible.

Moreover, the doctrine does not apply to legislative activities. Thus, in *R. v. Ministry of Agriculture*,¹⁵ conditions were imposed on fishing licences. The said action was challenged contending that the new policy was against 'legitimate expectations'. Rejecting the argument and dismissing the saction, the court held that the doctrine of 'legitimate expectations' cannot preclude legislation.

Likewise, in *Sri Srinivasa Theatre v. Govt. of T.N.*,¹⁶ by amending the provisions of the Tamil Nadu Entertainments Tax Act, 1939, the method of taxation was changed. The validity of the amendment was challenged *inter alia* on the ground that it was against legitimate expectation of the law in force prior to amendment. Rejecting the argument and following *Council of Civil Service Unions*, the Supreme Court held that a legislation cannot be invalidated on the basis that it offends the legitimate expectations of the persons affected thereby.

Again, doctrine of 'legitimate expectations' does not apply if it is contrary to public policy or against the security of State.

Thus, in *Council of Civil Service Unions v. Minister for Civil Service*,¹⁷ the staff of Government Communications Head Quarters (GCUQ) had the right to unionisation. By an order of the government, the employees of GCHGQ were deprived of this right. The union challenged the said action contending that the employees of GCHQ had legitimate expectations of being consulted before the Minister took action.

Though in theory, the House of Lords agreed with the argument of the Union about legitimate expectations, it held that "the Security con-

14. (1990) 64 Aust LJR 327; (1990) 93 ALR 1.

15. (1991) 1 All ER 41.

16. (1992) 2 SCC 643; AIR 1992 SC 999.

17. (1984) 3 All ER 935; (1984) 3 WLR 1174; (1985) AC 374.

siderations put forward by the Government—override the right of the Union to prior consultation.”

Similarly, in *State of M.P. v. Kailash Chand*,¹⁸ an Act was amended by providing age of superannuation. It was contended that when an appointment was made by fixing a tenure, there was right to continue and the doctrine of legitimate expectation would apply. The claim was, however, negated observing that “legitimate expectation cannot preclude legislation.”

In *Union of India v. Hindustan Development Corpn.*,¹⁹ in government contract, dual pricing policy was fixed by the State Authorities (lower price for big suppliers and higher price for small suppliers). That action was taken in larger public interest and with a view to break “cartel”, it was held that adoption of dual pricing policy by government did not amount to denial of legitimate expectation.

(n) Conclusions

From the above discussion, it is clear that the doctrine of legitimate expectations in essence imposes a duty to act *fairly*. Legitimate expectations may come in various forms and owe their existence to different kinds of circumstances. It is not possible to give an exhaustive list in the context of vast and fast expansion of government activities. They shift and change so fast that the start of our list would be absolute before we reached the middle.²⁰

One thing, however, is clear. A court cannot assume jurisdiction to review administrative act or decision, which is *unfair* in the opinion of the court. If that be allowed, the court would be exercising jurisdiction to do the very thing which is to be done by the repository of an administrative power, i.e. choosing among the courses of action upon which reasonable minds might differ.²¹

It is submitted that the following observations of Brennan, J. in *Attorney General for New South Wales v. Quin*,²² lay down the correct law on the point:

18. 1992 Supp (2) SCC 351: AIR 1992 SC 1277.

19. (1993) 3 SCC 499: AIR 1994 SC 980.

20. *Union of India v. Hindustan Development Corpn.*, (1993) 3 SCC 499 (548-49): AIR 1994 SC 980 (1020-21).

21. *Attorney General v. Quin*, (1990) 64 Aust LJR 327: (1990) 93 ALR 1.

22. (1990) 64 Aust LJR 327, cited in *Union of India v. Hindustan Development Corpn.* (*supra*); *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509.

“(T)he Court must stop short of compelling fulfilment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power. It follows that *the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not to unlock the gate which shuts the court out of review on the merits.*” (emphasis supplied)

15. CONCLUSIONS

It is a fundamental principle of law that every power must be exercised within the four corners of law and within the legal limits. Exercise of administrative power is not an exception to that basic rule. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that the power to prevent the abuse is the acid test of effective judicial review.²³

Under the traditional theory, courts of law used to control existence and extent of prerogative power but not the manner of exercise thereof. That position was, however, considerably modified after the decision in *Council of Civil Service Unions v. Minister for Civil Service*,²⁴ wherein it was emphasised that the reviewability of discretionary power must depend upon the subject-matter and not upon its source. The extent and degree of judicial review and justifiable area may vary from case to case.²⁵

At the same time, however, the power of judicial review is not unqualified or unlimited. If the courts were to assume jurisdiction to review administrative acts which are ‘unfair’ in their opinion (on merits), the courts would assume jurisdiction to do the very thing which is to be done by administration. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.²⁶

It is submitted that the following observations of Frankfurter, J. in *Trop v. Dulles*,²⁷ lay down correct legal position;

“All power is, in Madison’s Phrase ‘of an encroaching nature’. Judicial Power is not immune against this human weakness. *It also*

23. Wade: *Administrative Law*, (1994), pp. 39-41.

24. (1984) 3 All ER 935; (1984) WLR 1174; (1985) AC 374.

25. Craig: *Administrative Law*, (1993), p. 291.

26. *Attorney General, New South Wales v. Quin*, (1990) 64 Aust LJR 327; (1990) 93 ALR 1.

27. (1958) 35 US 86.

must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint.'²⁸

(emphasis supplied)

Id. at p. 119. See also *Union of India v. Hindustan Dev. Corpn.*, (1993) 3 SCC 499; AIR 1994 SC 980.

Lecture IX
Judicial and other Remedies

“Ubi jus ibi remedium”

The King is at all times entitled to have an account, why the liberty of any of his subjects is restrained. —BLACKSTONE

We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of nine men; and they are more powerful than all the others put together. —GEORGE W. NORRIS

S Y N O P S I S

1. Introduction
2. Prerogative remedies
 - (a) Meaning
 - (b) Historical background
 - (c) Constitutional provisions
 - (d) Object
 - (e) Nature and scope
 - (f) Discretionary remedy
 - (g) Locus standi: who may apply
 - (h) Against whom writ would lie
 - (i) Territorial jurisdiction
 - (j) Delay and laches
 - (k) Alternative remedy
 - (l) Disputed questions of fact
 - (m) Suppression of material facts
 - (n) Public Interest Litigation
 - (i) General
 - (ii) Nature
 - (iii) Object
 - (iv) Illustrative cases
 - (v) Conclusions
 - (o) Writs in particular
 - I. HABEAS CORPUS
 - (a) General
 - (b) Object
 - (c) History
 - (d) Who may apply
 - (e) Against whom habeas corpus would lie
 - (f) Procedure

- (g) Delay in applying
- (h) When may be refused
- (i) Duty of State
- (j) Duty of Courts
- (k) Successive applications
- (l) Compensation
- (m) Execution
- (n) Habeas corpus and proclamation of Emergency
- (o) General Principles

II. MANDAMUS

- (a) Nature and scope
- (b) Mandamus distinguished from other writs
- (c) Conditions
- (d) Who may apply
- (e) Against whom mandamus would lie
- (f) Against whom mandamus would not lie
- (g) Alternative remedy
- (h) Certiorarified mandamus
- (i) Conclusions

III. PROHIBITION

- (a) Nature and scope
- (b) Prohibition distinguished from other writs
- (c) Grounds
 - (i) Absence or excess of jurisdiction
 - (ii) Violation of natural justice
 - (iii) Unconstitutionality of statute
 - (iv) Infringement of Fundamental Rights
- (d) Who may apply
- (e) Against whom prohibition would lie
- (f) Against whom prohibition does not lie
- (g) Alternative remedy
- (h) Limits of prohibition
- (i) Conclusions

IV. CERTIORARI

- (a) Nature and scope
- (b) Object
- (c) Certiorari distinguished from other writs
- (d) Conditions
- (e) Grounds
 - (i) Error of jurisdiction
 - (ii) Jurisdictional fact
 - (iii) Error apparent on face of record
 - (iv) Violation of natural justice
- (f) Who may apply
- (g) Against whom certiorari would lie
- (h) Alternative remedy

(i) Limits of certiorari

(j) Conclusions

V. QUO WARRANTO

(a) Nature and scope

(b) Object

(c) Quo warranto distinguished from other writs

(d) Conditions

(e) Who may apply

(f) When may be refused

(g) Alternative remedy

(h) Delay

(i) De facto doctrine

(j) Conclusions

3. Constitutional remedies

(a) Extraordinary remedies

(b) Appeals to Supreme Court

(c) Special Leave Petitions

(i) Constitutional provisions

(ii) Object

(iii) Nature and scope

(iv) Extent and applicability

(v) When Supreme Court may refuse leave

(vi) When Supreme Court may grant leave

(vii) Constitution (42nd) Amendment

(viii) Constitution (44th) Amendment

(ix) Limitation

(x) Conclusions

(d) Supervisory jurisdiction of High Courts

(i) Constitutional provisions

(ii) Object

(iii) Nature and scope

(iv) Alternative remedy

(v) Binding nature of decisions of High Courts

(vi) Exclusion of Jurisdiction

(vii) Conclusions

4. Statutory remedies

(a) Civil suits

(b) Appeals to courts

(c) Appeals to tribunals

5. Equitable remedies

(a) General

(b) Declaration

(c) Injunction

(i) Definition

(ii) Types

(iii) Principles

6. Common law remedies
7. Parliamentary remedies
8. Conseil d'Etat
9. Ombudsman
 - (a) Meaning
 - (b) Importance
 - (c) Historical growth
 - (d) Powers and duties
 - (e) Status
 - (f) Defects
 - (g) Conclusions
10. Self-help

1. INTRODUCTION

Administrative law provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable it to carry on effective Government.¹ Due to increase in governmental functions, administrative authorities exercise vast powers in almost all fields. But as has been rightly observed by Lord Denning,² "properly exercised the new powers of the executive lead to Welfare State, but abused they lead to the Totalitarian State". Without proper and effective control an individual would be without remedy, even though injustice is done to him. This would be contrary to the fundamental concept in English and Indian legal systems in which the maxim '*ubi jus ibi remedium*' (wherever there is a right there is a remedy) has been adopted since long. In fact, right and remedy are two sides of the same coin and they cannot be dissociated from each other. The remedies available to an individual aggrieved by any action of an administrative authority may be classified as follows:

- (1) Prerogative remedies;
- (2) Constitutional remedies;
- (3) Statutory remedies;
- (4) Equitable remedies;
- (5) Common law remedies;
- (6) Parliamentary remedies;
- (7) Conseil d' Etat;
- (8) Ombudsman; and
- (9) Self-help.

Let us now consider each of them in detail.

1. Garner: *Administrative Law*, 1963, p. 95.

2. *Freedom under the Law*, 1949, p. 126.

2. PREROGATIVE REMEDIES³

(a) Meaning

Though the expression "prerogative writ" is well known, precise and scientific definition of the said term is not possible. However, as the name indicates, it is a writ specially associated with the King. Under the Common law, the sovereign was considered as the fountain of justice. The Crown used to exercise extraordinary and prerogative powers in the interest of justice.

(b) Historical background

In England, the high prerogative writs played a very important role in upholding the rights and liberties of subjects and in providing effective safeguards against arbitrary exercise of power by public authorities. Under the provisions of the Regulating Act, 1773, three Supreme Courts were established at Calcutta, Madras and Bombay by issuing a Royal Charter and they were vested with power to issue the high prerogative writs. The said power was also conferred on High Courts established under the Indian High Courts Act, 1861 and since then, High Courts exercise the power to issue the prerogative writs to protect the rights of individuals.

(c) Constitutional provisions

The Founding Fathers of the Constitution of India were aware of the part played by prerogative writs in England. In these circumstances, they have made specific provisions in the Constitution itself empowering the Supreme Court and High Courts to issue writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* for enforcement of Fundamental Rights (Articles 32 and 226) and also for other purposes (Article 226). Articles 32 and 226 read as under:

"32. Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

3. For detailed discussion, see C.K. Thakker: *Administrative Law*, 1996, pp. 375-439; V.G. Ramachandran: *Law of Writs*, 1993.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by the Constitution.

226. *Power of High Courts to issue certain writs.*—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this Article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

(d) Object

As stated above, right and remedy are really the two sides of the same coin and they cannot be dissociated from each other. Therefore whenever an individual is aggrieved by any illegal action of an authority certain remedies are available to him. The most important is issuance of prerogative writs.

Article 32 guarantees the right to move the Supreme Court by appropriate proceedings for enforcement of fundamental rights guaranteed by Part III of the Constitution. Dr Ambedkar, one of the principal architects of the Constitution, said about Article 32 as under:

“If I was asked to name any particular Article in this Constitution as the most important Article without which this Constitution would be a nullity, I could not refer to any other Article except this one. *It is the very soul of the Constitution and the very heart of it.*”

(emphasis supplied)

The right to move the Supreme Court by appropriate proceeding for the enforcement of the rights conferred by Part III of the Constitution is itself a fundamental right. That being so, a right to obtain a writ when the petitioner establishes a case for it, must equally be a fundamental right. It is, therefore, not merely a right of an individual to move the Supreme Court, but also the duty and responsibility of the Supreme Court to protect the Fundamental Rights.⁵

Article 226 empowers every High Court to issue directions, order or writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them. Such directions, orders or writ may be issued (i) for enforcement of fundamental rights, or (ii) for any other purpose.

So far as the enforcement of fundamental rights is concerned, the jurisdiction of the High Court is substantially the same. If there is violation of a fundamental right and it is the duty of the Supreme Court to enforce it, it is absurd to contend that there is no such duty on High Courts to grant relief in case of violation of fundamental rights. In *Devila v. STO*⁶, Gajendragadkar, J. (as he then was) rightly stated:

4. *Constituent Assembly Debates*, Vol. III, p. 953.

5. *Daryao v. State of U.P.*, AIR 1961 SC 1457 (1461); (1962) 1 SCR 574; *K.A. Kochuni v. State of Madras*, AIR 1959 SC 725 (730); 1959 Supp (2) SCR 316; *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568 (574-75); AIR 1981 SC 344 (347).

6. AIR 1965 SC 1150: (1965) 1 SCR 686.

“There can be no doubt that the Fundamental Rights, guaranteed to the citizens are a significant feature of our Constitution and *the High Courts under Article 226 are bound to protect these Fundamental Rights.*”⁷ (emphasis supplied)

But when there is violation not of any fundamental right but of an ordinary legal right, the jurisdiction of the High Court under Article 226 is discretionary. It has been rightly observed in the case of *Manjula v. Director of Public Instruction*⁸:

“As at present advised, I am of the opinion that the proper interpretation of Article 226 would be that *in enforcing a Fundamental Right guaranteed under the Constitution the court is under a duty to exercise its power under that Article while in exercising this power for any other purpose it has a discretion.*” (emphasis supplied)

(e) Nature and scope

The jurisdiction of High Courts under Article 226 of the Constitution is equitable and should be exercised to ensure that the law of the land is obeyed and public authorities are kept within the limits of their jurisdiction. In a proceeding under Article 226, the High Court does not determine private rights of parties. It is a remedy against violation of rights by State or statutory authorities. *It is a remedy in public law.*⁹ (emphasis supplied)

(f) Discretionary remedy

The jurisdiction of High Courts under Article 226 of the Constitution is discretionary and it should be exercised in the larger interest of justice (*ex debito justitiae*). The High Court may issue writs in the nature of prerogative writs as understood in England for doing substantial justice. While exercising powers, the court must keep in mind the well-established principles of justice and fair play and should exercise the discretion if the ends of justice require it.¹⁰

7. *Id.* at p. 1152 (AIR); see also *Charanjit Lal v. Union of India*, AIR 1951 SC 41; 1950 SCR 869; *Mohd. Yasin v. Town Area Committee*, AIR 1952 SC 115; 1952 SCR 572; *State of Bombay v. United Motors*, AIR 1953 SC 252 (256); 1953 SCR 1069; *Himmatlal v. State of M.P.*, AIR 1954 SC 403 (405-06); 1954 SCR 1122; *K.K. Kochuni v. State of Madras*, (*supra*); *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 (192); AIR 1984 SC 802 (817).

8. AIR 1952 Ori 344 (347).

9. *Mohammed Hanif v. State of Assam*, (1969) 2 SCC 782 (786); (1970) 2 SCR 197 (202-03); *LIC v. C.E.R.C.*, (1995) 5 SCC 482 (498-99); AIR 1995 SC 1811.

10. *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha*, (1980) 2 SCC 593; AIR 1980 SC 1896.

As rightly observed by Krishna Iyer., J., “we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in”.¹¹

(emphasis supplied)

(g) Locus standi: who may apply

Locus standi asks the question whether the petitioner is entitled to invoke the jurisdiction of the court. This question is different from the question whether the petitioner is entitled to the relief as prayed by him.¹² The attitude of the courts in the question of *locus standi* does not appear to be uniform. They vary from country to country, court to court and case to case. In some cases courts have taken a very narrow view holding that unless an applicant has suffered legal injury by reason of violation of his legal right or legally protected interest, he cannot file a petition. The other extreme view is that the courts may in their discretion issue a writ at the instance of any member of public. A close scrutiny, however, reveals that neither of the two extreme views is correct.

As a general rule, in order to have *locus standi* to file a petition, the petitioner should be an ‘aggrieved person’. The question, however, is who is an aggrieved person? The expression denotes an elastic, and to some extent, an illusive concept. According to the traditional theory, only a person whose right has been infringed can apply to the court. But the modern view has liberalised the concept of aggrieved person and the right-duty pattern commonly found in private litigation has been given up. The only limitation is that such a person should not be a total stranger.¹³

(h) Against whom writ would lie

Ordinarily, a writ would lie against the State and statutory bodies and persons charged with public duties.¹⁴ Though private persons are not

11. *Id.* at p. 624 (SCC): 1916 (AIR).

12. *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568 (579-80, 588-89); AIR 1981 SC 344 (350, 356); *Bangalore Medical Trust v. Muddappa*, (1991) 4 SCC 54; AIR 1991 SC 1902.

13. *Jasbhai Motibhai v. Roshan Kumar*, (1976) 1 SCC 671; AIR 1976 SC 578; *S.P. Gupta v. Union of India*, 1981 Supp SCC 87; AIR 1982 SC 149; *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568; AIR 1981 SC 344; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; AIR 1984 SC 802.

14. *Sohan Lal v. Union of India*, AIR 1957 SC 529; 1957 SCR 738; *Praga Tools Corpn. v. Imanual*, (1969) 1 SCC 585; AIR 1969 SC 1306; for detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 44-77.

immune from the writ jurisdiction of the Supreme Court as well as of High Courts, issuance of a writ to them would require exceptional circumstances.¹⁵

As a general rule, a writ can be issued against Parliament and Legislatures of States,¹⁶ Central and State Governments,¹⁷ all local authorities¹⁸ and other authorities. *Rajasthan State Electricity Board v. Mohan Lal*¹⁹ is the leading decision wherein the Supreme Court interpreted the expression "other authorities" in Article 12 liberally. The law developed very fast thereafter and a number of authorities were held to be "State" within the meaning of Article 12.

The following authorities are held to be "State" within the meaning of Article 12 of the Constitution:

Airport Authority, Railway Board, Electricity Board, Transport Corporation, Port Trust, Reserve Bank, Nationalised Banks, Oil and Natural Gas Commission, Life Insurance Corporation, State Trading Corporation, Indian Oil Corporation, Food Corporation, Bharat Petroleum, Sainik School, Modern Bakery, a public or private trust receiving grant from the Government, etc.

The following authorities, on the other hand, are held not to be "State" within the meaning of Article 12 of the Constitution:

Hindustan Shipyard, Council of Scientific and Industrial Research, a company registered under the Companies Act, 1956, Army Welfare Housing Organisation (AWHO), National Council of Educational Research and Training (NCERT), Cooperative Banks, Private Institutions or bodies performing private functions, etc.

15. *Id.* see also *Rohtas Industries Ltd. v. Staff Union*, (1976) 2 SCC 82: AIR 1976 SC 425; *Anadi Mukta Sadguru Trust v. V.R. Rudani*, (1989) 2 SCC 691: AIR 1989 SC 1607.

16. Under Article 143, *Constitution of India, Re*, AIR 1965 SC 745: (1965) 1 SCR 413.

17. *Khajoor Singh v. Union of India*, AIR 1961 SC 532: (1961) 2 SCR 828; *Madhav Rao Scindia v. Union of India*, (1971) 1 SCC 85: AIR 1971 SC 530.

18. *Union of India v. R.C. Jain*, (1981) 2 SCC 308: AIR 1981 SC 951; *Municipal Corpn. of Delhi v. Birla Cotton Mills*, AIR 1968 SC 1232: (1968) 3 SCR 251; *Dwarkadas v. Board of Trustees*, (1989) 3 SCC 293: AIR 1989 SC 1642.

19. AIR 1967 SC 1857: (1967) 3 SCR 377; see also *Sukhdev Singh v. Bhagatram*, (1975) 1 SCC 421: AIR 1975 SC 1331; *R.D. Shetty v. International Airport Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628; *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722: AIR 1981 SC 487; see also V.G. Ramachandran: *Law of Writs*, 1993, pp. 58-77.

(i) Territorial jurisdiction

The powers of the Supreme Court under Article 32 of the Constitution are not circumscribed by any territorial limitation. The powers of High Courts under Article 226 of the Constitution, on the other hand, have territorial limitations. Such powers extend to any person or authority within their territorial jurisdiction.

(j) Delay and laches

It is well settled that under Article 226, the power of a High Court to issue an appropriate writ is discretionary. One of the grounds for refusing relief under Article 226 is that the petitioner has been guilty of delay and laches. It is imperative, if the petitioner wants to invoke the extraordinary remedy available under Article 226 of the Constitution, that he should come to the court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will be a good ground for refusing to exercise the discretion. It is essential that persons who are aggrieved by any order of the Government or any executive action should approach the High Court with utmost expedition.²⁰ In an appropriate case the High Court may not exercise its discretion and may refuse to grant relief if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the other party.²¹

The underlying object is that the courts do not encourage agitation of State claims and exhuming matters which have already been disposed of or where the rights of third parties have accrued in the meantime, or where there is no reasonable explanation for delay.²² This principle applies even in case of infringement of fundamental rights.²³

20. *Narayani Devi v. State of Bihar*, C.A. No. 140 of 1964, decided. on 22-9-1964 (SC); *Durga Prasad v. Chief Controller*, (1969) 1 SCC 185; AIR 1970 SC 769; *State of M.P. v. Bhailal*, AIR 1964 SC 1006; (1964) 6 SCR 261; *Kamini Kumar v. State of W.B.*, (1972) 2 SCC 420; AIR 1972 SC 2060; *Chandra Bhushan v. Dy. Director*, AIR 1967 SC 1272; (1967) 2, SCR 286.

21. *Id.* see also *Moon Mills v. Industrial Court, Bombay*, AIR 1967 SC 1450; (1967) 2 LLJ 34; *R.S. Deodhar v. State of Maharashtra*, (1974) 1 SCC 317; AIR 1974 SC 259.

22. *Id.* see also *Tilokchand Motichand v. H.B. Munshi*, (1969) 1 SCC 110; AIR 1970 SC 898; *Rup Diamonds v. Union of India*, (1989) 2 SCC 356; AIR 1989 SC 674.

23. *Tilokchand Motichand v. H.B. Munshi (Id.)*; *Durga Prasad v. Chief Controller*, (1969) 1 SCC 185; AIR 1970 SC 769; *Rabindra v. Union of India*, (1970) 1 SCC 84; AIR 1970 SC 470.

Where there is inordinate delay in filing a writ petition, the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution of India may refuse to exercise its discretionary powers. The act that the third party's rights were not created is hardly a ground for interference. This principle also applies to orders which are void.

Very recently, in *State of Rajasthan v. Laxmi*²⁴, the Supreme Court stated:

"Though the order may be void, if the party does not approach the court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. *When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void.*" (emphasis supplied)

The real difficulty is about the measure of delay. Since the Limitation Act does not apply to writ petitions and no period of limitation is prescribed by the Constitution to move the Supreme Court under Article 32 or High Courts under Article 226, the matter is 'more or less' left to judicial discretion. In *Narayani Devi (Smt) v. State of Bihar*²⁵, speaking for the Supreme Court, Gajendragadkar, C.J. observed: "No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and *like all matters left to the discretion of the court, in this matter too discretion must be exercised judiciously and reasonably.*" (emphasis supplied)

In *Tilokchand Motichand v. H.B. Munshi*²⁶, Hidayatullah, C.J. observed: "[T]he question is one of discretion for this court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some article but this court need not necessarily give the total time to the litigant to move this court under Article 32. Similarly, in a suitable case this court may entertain such a petition even after a lapse of time. *It will all depend on what the breach of the Fundamental Right and the remedy claimed are and when and how the delay arose.*" (emphasis supplied)

24. (1996) 6 SCC 445 (453). See also *State of Punjab v. Gurdev Singh*, (1991) 4 SCC 1; AIR 1992 SC 111.

25. C.A. 140 of 1964, decided on September 22, 1964 (SC) (unrep.).

26. (1969) 1 SCC 110 (116); AIR 1970 SC 898.

Thus, while on the one hand, writ petitions filed within the 'period of limitation' prescribed for a civil action for the same remedy may be dismissed on the ground of delay and laches, and on the other hand, a court may entertain a petition even after 'the period of limitation'.²⁷

It is submitted that the correct view is as laid down by the Supreme Court in *P.S. Sadasivaswamy v. State of T.N.*²⁸, in the following words:

"It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a certain length of time. But *it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters.*"²⁹

(emphasis supplied)

(k) Alternative remedy

It is well-established that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant such a relief in certain circumstances even though a legal right might have been infringed. Availability of an alternative remedy is one of such considerations which the High Court may take into account to refuse to exercise its discretion.³⁰

The underlying object is apparent and obvious. High Courts are the apex judicial institutions in the States and it is but natural that if an alternative, adequate and equally efficacious remedy is available to the party, they may refuse to exercise this extraordinary jurisdiction and direct the aggrieved party to first avail of the said alternative remedy.³¹

Ordinarily, in case of infringement of non-fundamental rights, a High Court may refuse to grant relief under Article 226 if the aggrieved party

27. *Id.* see also V.G. Ramachandran: *Law of Writs*, 1993, pp. 129-50.

28. (1975) 1 SCC 152; AIR 1974 SC 2271.

29. *Id.* at p. 154 (SCC): 2272 (AIR).

30. *Rashid v. Income Tax Investigation Commission*, AIR 1954 SC 207 (210); 1954 SCR 738; *Union of India v. T.R. Verma*, AIR 1957 SC 882 (884); 1957 SCR 499; *Thansingh v. Supdt. of Taxes*, AIR 1964 SC 1419 (1423); (1964) 6 SCR 654.

31. *Id.* see also *Venkateshwaran v. Wadhwani*, AIR 1961 SC 1506 (1508-10); (1962) 1 SCR 753; *Baburam v. Zila Parishad*, AIR 1969 SC 556 (558); (1969) 1 SCR 518.

can file appeal or application against the impugned order.³² A High Court may also refuse relief if a person may obtain appropriate relief by filing a suit, by making an application or representation or by raising a dispute in accordance with law.³³

It should, however, be remembered that the existence of an alternative remedy is not an absolute bar to the granting of writ under Article 226 of the Constitution. It is a rule of policy and practice and not a rule of law. It is a question of discretion and not of jurisdiction. Therefore, in exceptional cases a writ can be issued notwithstanding the fact that an alternative remedy is available to the party and has not been availed of.³⁴

Thus, if there is violation of a fundamental right, an aggrieved party has the right to move the Supreme Court under Article 32 or a High Court under Article 226.³⁵ Similarly, if the remedy provided by the statute cannot be said to be 'alternative', adequate or equally efficacious or the Act by which such a remedy is provided is itself ultra vires or unconstitutional or the impugned order is without jurisdiction or violative of the principles of natural justice, the court can grant relief to the petitioner.³⁶

It is submitted that the following observations of Das, C.J. in the leading case of *State of U.P. v. Mohd. Nooh*³⁷ lay down the correct proposition of law:

"The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. *But this rule requiring*

32. *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86: 1958 SCR 595; *STO v. Shiv Ratan*, AIR 1966 SC 142: (1965) 3 SCR 71; *Titaghur Paper Mills v. State of Orissa*, (1983) 2 SCC 433: AIR 1983 SC 603.

33. *Sohan Lal v. Union of India*, AIR 1957 SC 529 (531): 1957 SCR 738; *Bhopal Sugar Industry v. STO*, AIR 1967 SC 549 (551-52): (1964) 1 SCR 488; *Basant Kumar v. Eagle Rolling Mills*, AIR 1964 SC 1260 (1263): (1964) 6 SCR 913.

34. *Rashid Ahmed v. Municipal Board*, AIR 1950 SC 163 (165): 1950 SCR 566; *Union of India v. T.R. Verma (supra)*; *Baburam v. Zila Parishad (supra)*.

35. *K.K. Kochuni v. State of Madras*, AIR 1959 SC 725 (730): 1959 Supp (2) SCR 316.

36. *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86: 1958 SCR 595; *Ram & Shyam v. State of Haryana*, (1985) 3 SCC 267: AIR 1985 SC 1147; *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156: AIR 1986 SC 1571.

37. AIR 1958 SC 86: 1958 SCR 595.

*the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law....*³⁸ (emphasis supplied)

(l) Disputed questions of fact

Normally, in exercise of powers under Article 32 or under Article 226 of the Constitution of India, the Supreme Court or a High Court may not investigate into disputed questions of fact. Ordinarily, such questions are to be left to the fact-finding authority. The question, however, is of discretion and not of jurisdiction.³⁹

In *Om Prakash v. State of Haryana*⁴⁰, the Supreme Court rightly stated: "There is no rule that the High Court will not try issues of fact in a writ petition. In each case the court has to consider whether the party seeking the relief has an alternative remedy which is equally efficacious by a suit, whether refusal to grant relief in a writ petition may amount to denying relief, whether the claim is based substantially upon consideration of evidence, oral and documentary of a complicated nature and whether the case is otherwise fit for trial in exercise of the jurisdiction to issue high prerogative writs."

(m) Suppression of material facts

Under the English Law, a person invoking prerogative remedy of the King's Courts must come with clean hands. He should make full, complete and candid disclosure of all material facts. He must refrain from suppressing, concealing or deliberately keeping back material facts and circumstances from the court even if they are against him. If the applicant does not make fullest possible disclosure of every material fact, the court may reject his petition only on that ground without going into the merits.⁴¹

The same principle applies to Indian Law. It is well-settled that a party seeking relief under Article 32 or under Article 226 of the Constitution must be truthful, frank and open. He should disclose all relevant facts without any reservation. He cannot pick and choose the facts he likes to disclose and keep back or conceal other facts. The very basis of

38. *Id.* at p. 93 (AIR). For detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 151-84.

39. *DLF Housing Construction v. Delhi Municipal Corpn.*, (1976) 3 SCC 160: AIR 1976 SC 386; *Sohanlal v. Union of India*, AIR 1957 SC 529: 1957 SCR 738; *Kamini Kumar v. State of W.B.*, (1972) 2 SCC 420: AIR 1972 SC 2060.

40. (1971) 3 SCC 792 (793); see also *Babubhai Patel v. Nandlal Barot*, (1974) 2 SCC 706: AIR 1974 SC 2105.

41. *R v. Kensington Income Tax Commrs.*, (1917) 1 KB 486.

the writ jurisdiction rests on disclosure of correct facts. If material facts are suppressed, twisted or distorted, the very functioning of writ courts would become impossible.⁴²

(n) Public Interest Litigation (PIL)

(i) General

A novel and recent feature of Indian Legal System is the rapid growth and development of public interest litigation. In a number of cases, the Supreme Court as well as many High Courts have entertained petitions and "letters" not only by the person or persons who can be said to be "aggrieved" or adversely affected in strict sense of the term by any action or omission by the respondents but acting *pro bono publico*.⁴³

(ii) Nature

Public interest litigation is a totally different *field* of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and the other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.

(iii) Object

Public interest litigation is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution.

In public interest litigation, the role held by the court is more assertive than in traditional actions; it is creative rather than passive, and it assumes a more positive attitude in determining facts.

42. *Vijay Kumar v. State of Haryana*, (1983) 3 SCC 333 (334-35); AIR 1983 SC 622; *State of Haryana v. Karnal Distillery*, (1977) 2 SCC 431; AIR 1977 SC 781; *Narayanaswamy v. State of Karnataka*, (1991) 3 SCC 261 (263); AIR 1991 SC 1726 (1728); *All India State Bank Officers' Federation v. Union of India*, 1990 Supp SCC 336 (340-41).

43. For detailed discussion of 'Public Interest Litigation', see C.K. Thakker: *Administrative Law*, 1996, pp. 539-86; V.G. Ramachandran: *Law of Writs*, 1993, pp. 549-77.

(iv) Illustrative cases

In the leading case of *S.P. Gupta v. Union of India*⁴⁴, (popularly known as the *Judges' Transfer case*), the Supreme Court entertained petitions by lawyers challenging the constitutionality of Law Minister's circular regarding transfer and non-confirmation of Judges of High Courts. Similarly, in *People's Union for Democratic Rights v. Union of India*⁴⁵, (*Asiad case*), a petition by public-spirited organisation on behalf of persons belonging to socially and economically weaker section employed in the construction work of various projects connected with the Asian Games, 1982 complaining of violation of various provisions of labour laws was held maintainable. In *D.S. Nakara v. Union of India*⁴⁶, it was held that a registered cooperative society consisting of public-spirited citizens seeking to espouse the cause of old and retired infirm pensioners unable to seek redress through expensive judicial procedure can approach the court by filing a petition. Likewise, a public-spirited organisation was held entitled to move the court for release of bonded labourers working in stone quarries⁴⁷, or against unjustifiable police atrocities, and for compensation.⁴⁸ A guardian of a student of a medical college can complain to the court about ragging of junior students by senior students of the college⁴⁹. A professor of politics "deeply interested in ensuring proper implementation of the constitutional provisions" can approach the court against practice of issuing promulgation of Ordinances on large scale being fraud on the Constitution of India⁵⁰.

In *Municipal Council, Ratlam v. Vardichand*⁵¹, the Supreme Court issued certain directions to the Municipal Council to construct public latrines, drains, etc. In *State of H.P. v. Umed Ram Sharma*⁵², on the basis of a letter addressed by some poor harijans, directions were issued by the court to construct road in a hilly area of the State of Himachal

44. 1981 Supp SCC 87; AIR 1982 SC 149.

45. (1982) 3 SCC 235; AIR 1982 SC 1473.

46. (1983) 1 SCC 305; AIR 1983 SC 130.

47. *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; AIR 1984 SC 802.

48. *People's Union for Democratic Rights v. State of Bihar*, (1987) 1 SCC 265; AIR 1987 SC 355; *Khatri v. State of Bihar (Bhagalpur Blinding case)*, (1981) 1 SCC 623; AIR 1981 SC 928; *Saheli v. Commr. of Police*, (1990) 1 SCC 422; AIR 1990 SC 513; *Supreme Court Legal Aid Committee v. State of Bihar*, (1991) 3 SCC 482.

49. *State of H.P. v. Parent of a Student of Medical College*, (1985) 3 SCC 169; AIR 1985 SC 910.

50. *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378; AIR 1987 SC 579.

51. (1980) 4 SCC 162; AIR 1980 SC 1622.

52. (1986) 2 SCC 68; AIR 1986 SC 847.

Pradesh. Again, the court can direct the Government to pay compensation to the victims if they have suffered irreversible damage to their eyes at the eye-camp.⁵³ In *Charan Lal Sahu v. Union of India*⁵⁴, the court upheld the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 with a view to extending relief and immediate help to the victims. In *Parmanand Katara v. Union of India*⁵⁵, the court directed the Government that every injured citizen brought for medical treatment should instantaneously be given aid to preserve life and only thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death of an injured.

(v) *Conclusions*

The court must be careful to see that the petitioner who approaches it is acting *bona fide* and not for personal gain, private profit or for political or other oblique considerations. In other words, it is not only the *right* but the *duty* of the court to see that the judicial process should not be abused or misused in the name of public interest litigation or with a view to achieving private goals or political objectives⁵⁶. The court must also take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved for the executive or the legislature by the Constitution.⁵⁷

It is submitted that the following observations must always be borne in mind in dealing with public interest litigation:

“If carefully and prudently used, the public interest litigation has great potential in correcting administrative wrong, but if liberally and indiscriminately used in all kinds of cases, it may turn into an engine of destruction.”⁵⁸

53. *A.S. Mittal v. State of U.P.*, (1989) 3 SCC 233: AIR 1989 SC 1570.

54. (1990) 1 SCC 613: AIR 1990 SC 1480.

55. (1989) 4 SCC 286: AIR 1989 SC 2039.

56. *Chhetriya Pradushan Mukti Sangharsh Samiti v. State of U.P.*, (1990) 4 SCC 449: AIR 1990 SC 2060; *Shubhash Kumar v. State of Bihar*, (1991) 1 SCC 598: AIR 1991 SC 420; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802; *Sachidanand Pandey v. State of W.B.*, (1987) 2 SCC 295: AIR 1987 SC 1109; *Sheela Barse v. Union of India*, (1988) 4 SCC 226: AIR 1988 SC 2211; *Janata Dal v. H.S. Chowdhary*, (1991) 3 SCC 756 (*Bofors Gun Deal case*).

57. *State of H.P. v. Parent of a Student of Medical College*, (1985) 3 SCC 169 (174): AIR 1985 SC 910; *State of H.P. v. Umed Ram Sharma*, (1986) 2 SCC 68 (80-81): AIR 1986 SC 847.

58. Dr S.N. Jain: *Standing and Public Interest Litigation*.

(o) Writs in particular

I. *HABEAS CORPUS*(a) *General*

The writ of *habeas corpus* is one of the most ancient writs known to the common law of England. The latin phrase '*habeas corpus*' means 'have the body'. This is a writ in the nature of an order calling upon the person who has detained another to produce the latter before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment.⁵⁹ In other words, by this writ, the court directs the person or authority who has detained another person to bring the body of the prisoner before the court so that the court may decide the validity, jurisdiction or justification for such detention.

(b) *Object*

The writ of *habeas corpus* provides a prompt and effective remedy against illegal restraints. The principal aim is to provide for a swift judicial review of alleged unlawful detention. As Lord Wright⁶⁰ states, "the incalculable value of *habeas corpus* is that it enables the immediate determination of the right of the appellant's freedom". "If the court comes to the conclusion that there is no legal justification for the imprisonment of the person concerned, the court will pass an order to set him at liberty forthwith."⁶¹ Thus, the object of the writ of *habeas corpus* is to release a person from illegal detention and not to punish the detaining authority. "The question for a *habeas corpus* court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."⁶² Blackstone states:

"It is a writ antecedent to statute, and throwing its root deep into the genus of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."⁶³

59. *State of Bihar v. Kameshwar*, AIR 1965 SC 575 (577): (1963) 2 SCR 183.

60. *Greene v. Home Secy.*, (1942) AC 284 (302): (1941) 3 All ER 388.

61. *Ghulam Sarwar v. Union of India*, AIR 1967 SC 1335: (1967) 2 SCR 271.

62. *R. v. Home Secy., ex p Greene*, (1941) 3 All ER 104 (105).

63. *Comm.*, Vol. 3, p. 131.

(c) *History*

In England, *habeas corpus* is of common law origin. In India, the jurisdiction to issue prerogative writs came with the establishment of Supreme Courts at Calcutta, Bombay and Madras under the Regulating Act, 1773. On abolition of Supreme Courts and establishment of High Courts, the said power had been conferred on High Courts. Under the Constitution of India, the Supreme Court (Article 32) and all High Courts (Article 226) have power to issue a writ of *habeas corpus*.

(d) *Who may apply*

An application for the writ of *habeas corpus* may be made by the person illegally detained.⁶⁴ But if the prisoner himself is unable to make such application, it can be made by any other person having interest in the prisoner. Thus, a wife,⁶⁵ a father⁶⁶ or even a friend⁶⁷ may in such circumstances make an application for the writ of *habeas corpus*. He should not, however, be a total stranger.⁶⁸

(e) *Against whom habeas corpus would lie*

A writ of *habeas corpus* may be issued against any person or authority who has illegally detained or arrested the prisoner.

(f) *Procedure*

Every application for the writ of *habeas corpus* must be accompanied by an affidavit stating the facts and circumstances leading to the making of such an application. If the court is satisfied that there is a *prima facie* case for granting the prayer, it will issue a rule nisi calling upon the detaining authority on a specified day to show cause as to why the rule nisi should not be made absolute. On the specified day, the court will consider the merits of the case and will pass an appropriate order. If the court is of the opinion that the detention was not justified, it will issue the writ and direct the detaining authority to release the prisoner forthwith. On the other hand, if according to the court, the detention was justified, the *rule nisi* will be discharged. Where there is no return to the *rule nisi*, the prisoner is entitled to be released forthwith.⁶⁹ The court has jurisdiction to grant interim bail pending disposal of a

64. *Charanjit Lal v. Union of India*, AIR 1951 SC 41 (paras 43, 81): 1950 SCR 869.

65. *Cobbet v. Hudson*, (1850) 15 QB 988; *Sundarajan v. Union of India*, AIR 1970 Del 29 (FB).

66. *Thompson, Re*, (1860) 40 LJMC 19; *Sundarajan (Id.)*.

67. *Rajadhar, Re*, AIR 1948 Bom 334.

68. *Charanjit Lal v. Union of India*, AIR 1951 SC 41 (para 43): 1950 SCR 869.

69. *State of Bihar v. Kameshwar*, AIR 1965 SC 575: (1963) 2 SCR 183.

petition.⁷⁰ In exceptional circumstances, a petition is maintainable even if the person is not actually detained.⁷¹

(g) *Delay in applying*

Delay by itself in applying for a writ of *habeas corpus* does not disentitle the petitioner for the relief. The right of personal liberty is one of the fundamental rights guaranteed in Part III of the Constitution and it cannot be waived. Moreover, a wrongful detention or arrest of a person is a continuous wrong and the injury subsists till it is remedied. A petition for a writ of *habeas corpus*, therefore, cannot be dismissed on the ground of delay.

(h) *When may be refused*

Since the object of the writ of *habeas corpus* is remedial and not punitive, the legality or otherwise of the detention must be decided by the court with reference to the date of *return* of the *rule nisi* and not with reference to the date of *making* such application. Thus, the writ would not be issued if at the time of the *rule nisi*, the prisoner was not illegally detained, even though at the time of detention the order was illegal.⁷² Similarly, if during the pendency of the petition for the writ of *habeas corpus* the prisoner is released, it will become infructuous.⁷³

(i) *Duty of State*

Whenever an action of detaining or arresting any individual is challenged, it is the duty of the State to place before the court all relevant and material facts leading to the impugned action truly, faithfully and with utmost fairness.⁷⁴

(j) *Duty of Courts*

The liberty of an individual is the most cherished of human freedoms and in cases of gravest emergencies, Judges have played a historic role in guarding that freedom with zeal and jealousy. Where allegations are made that a person is in illegal custody, it is the duty of the Court to safeguard his freedom against any encroachment on life or liberty. The duty of the court is to strike a balance between the need to protect com-

70. *State of Bihar v. Ram Balak Singh*, AIR 1966 SC 1441: (1966) 3 SCR 314.

71. *Kiran Pasha v. Govt. of A.P.*, (1990) 1 SCC 328.

72. *Naranjan Singh v. State of Punjab*, AIR 1952 SC 106: 1952 SCR 395; *B.R. Rao v. State of Orissa*, (1972) 3 SCC 256: AIR 1971 SC 2197.

73. *Talib Hussain v. State of J&K*, (1971) 3 SCC 118: AIR 1971 SC 62.

74. *Halsbury's Laws of England*, 4th Edn., Vol. II, paras 1492-95, pp. 791-93; *Khudiram v. State of W.B.*, (1975) 2 SCC 81 (96): AIR 1975 SC 550 (560-61).

munity on the one hand and the necessity to preserve the liberty of a citizen on the other.⁷⁵

(k) *Successive applications*

For many years it was accepted in England that an unsuccessful applicant could go from judge to judge and court to court successively and get his application renewed on the same evidence and on the same grounds for the writ of *habeas corpus*.⁷⁶ Thus, the applicant "could go from one judge to another until he could find one more merciful than his brethren".⁷⁷ But *Hastings (No. 2), Re*,⁷⁸ the earlier view was overruled. Today, a person has no right to present successive applications for the writ of *habeas corpus*.⁷⁹ But if there are new or fresh grounds, subsequent petition will not be barred.⁸⁰

(l) *Compensation*

Ordinarily, while exercising powers under Article 32 or under Article 226 of the Constitution, the Court will not award compensation. In appropriate cases, however, the Court may award monetary compensation to the person who has been illegally arrested or detained. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the Court were limited to passing orders of release from illegal detention. *One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation.*⁸¹ (emphasis supplied)

(m) *Execution*

A writ of *habeas corpus* issued by the Supreme Court or by a High Court must be obeyed by the person to whom it is issued. A wilful interference by the person to whom it is issued would amount to contempt of court and would be punishable with attachment of property and even imprisonment of the contemner.⁸²

75. *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521 (612); AIR 1976 SC 1207; *A.K. Roy v. Union of India*, (1982) 1 SCC 271; AIR 1982 SC 710; *State of U.P. v. Hari Singh*, 1987 Supp SCC 190; AIR 1987 SC 2080.

76. *Eshugbayi Eleko v. Govt. of Nigeria*, AIR 1928 PC 300; (1928) AC 459.

77. Per Harman, J., in *Hastings (No. 3), Re*, (1959) Ch 368 (379); (1958) 3 WLR 768; (1959) 1 All ER 698.

78. (1959) 1 QB 358; (1958) 3 All ER 625 (per Lord Parker).

79. *Ghulam Sarwar v. Union of India*, AIR 1967 SC 1335; (1967) 2 SCR 271.

80. *Lallubhai Jogibhai v. Union of India*, (1981) 2 SCC 427; AIR 1981 SC 728.

81. *Rudal Shah v. State of Bihar*, (1983) 4 SCC 141; AIR 1983 SC 1086; *Bhim Singh v. State of J&K*, (1985) 4 SCC 677; AIR 1986 SC 494.

82. *Halsbury's Laws of England*, 4th Edn., Vol. II, paras 1497, pp. 793-94; *Mohd. Ikram v. State of U.P.*, AIR 1964 SC 1625 (1629); (1964) 5 SCR 86.

(n) *Habeas corpus and proclamation of Emergency*

Article 359 of the Constitution of India empowers the President to suspend the right to move any court for the enforcement of such of the fundamental rights conferred by Part III as may be mentioned in the Presidential Order. In *Makhan Singh v. State of Punjab*⁸³, the Supreme Court held that the court cannot issue a writ of *habeas corpus* to set at liberty a person who has been detained under the Defence of India Act, 1962 even if his detention was inconsistent with his constitutional rights guaranteed under Part III of the Constitution. But the Presidential Order does not debar the jurisdiction of the court to decide as to whether the order of detention was under the Defence of India Act, 1962 or rules made thereunder. It is open to the petitioner to contend that the order was *mala fide* or invalid and in either of the cases, he is entitled to move the court for the protection of his rights under Articles 21 and 22 of the Constitution of India.

Unfortunately, however, in *A.D.M., Jabalpur v. Shivakant Shukla*⁸⁴, the Supreme Court by a majority of 4: 1 held that during the Emergency and suspension of Fundamental Rights, no person has *locus standi* to move any court for a writ of *habeas corpus*. As stated elsewhere⁸⁵, the majority judgment does not lay down correct law.

(o) *General principles*

From the leading decisions, the following principles regarding a writ of *habeas corpus* emerge;⁸⁶

- (1) A writ of *habeas corpus* is a remedial writ, which can be used in all cases of wrongful deprivation of individual freedom and personal liberty.
- (2) It, however, cannot be employed to impeach or otherwise challenge the correctness or propriety of a decision rendered by a court of competent jurisdiction unless the decision is void or without jurisdiction.
- (3) An order of release by *habeas corpus* does not *per se* amount to discharge or acquittal of the prisoner or detenu.
- (4) Since a writ of *habeas corpus* is not punitive in nature, it cannot be utilised as an instrument of punishment of one who has

83. AIR 1964 SC 381: (1964) 4 SCR 797.

84. (1976) 2 SCC 521: AIR 1976 SC 1207.

85. See pp. 27-29 (*supra*). For detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 581-638.

86. For detailed discussion and case law, see V.G. Ramachandran: *Law of Writs*, (1993), pp. 581-638.

wrongfully arrested or detained another person or parted with his custody.

- (5) A prisoner or detenu himself or his relative or his friend or any other person interested in the prisoner or detenu can move the court for a writ of *habeas corpus*. He should not, however, be a total stranger.
- (6) A writ of *habeas corpus* is available not only for release from detention by the State but also for release from private detention.
- (7) Mere delay in applying for a writ of *habeas corpus* will not bar the prisoner or detenu from challenging arrest or detention.
- (8) A writ of *habeas corpus* is required to be heard and disposed of as expeditiously as possible.
- (9) When the detenu contends that he is wrongfully detained, the burden is on the authority to justify the detention. However, if the detenu takes a particular plea (such as *mala fide*), the burden is on him to establish it.
- (10) The approach of the Court in *habeas corpus* proceedings has to be one of eternal vigilance. The Court must strike a balance between the need to protect the society on the one hand and the necessity to safeguard the liberty of a citizen on the other hand.
- (11) In *habeas corpus* proceedings, it is the duty of the State to place before the Court all the material facts and relevant record truly, faithfully and with utmost fairness.
- (12) As a general rule, a writ of *habeas corpus* cannot be granted *ex parte*. In exceptional circumstances, however, the Court has power to issue a writ even *ex parte*.
- (13) Usually, no bail can be granted in case of preventive detention. Of course, in exceptional cases, the Court can grant bail or parole pending the proceedings.
- (14) In exceptional cases, even before actual detention a writ of *mandamus* against an order of detention is maintainable.
- (15) Wilful or intentional disobedience of a writ of *habeas corpus* will amount to contempt of court.
- (16) While issuing a writ of *habeas corpus*, the Court can award compensation or damages as a consequential or ancillary relief.
- (17) Once an order of detention has expired, revoked or is quashed and set aside, no fresh order can be passed on the same facts and for the same grounds.

- (18) If, however, after expiry, revocation or setting aside of an order of detention, new facts or fresh grounds come into existence, a fresh order can be passed.
- (19) General principles of *res judicata* apply even to *habeas corpus* proceedings, but on fresh grounds a subsequent petition for the same relief is maintainable even after dismissal of the earlier one.
- (20) Even during Emergency, a writ of *habeas corpus* for the enforcement of the fundamental rights guaranteed under Articles 20 and 21 is maintainable.

II. MANDAMUS

(a) Nature and scope

Mandamus means a command. It is an order issued by a court to a public authority asking it to perform a public duty imposed upon it by the Constitution or by any other law.⁸⁷ *Mandamus* is a judicial remedy which is in the form of an order from a superior court (the Supreme Court or a High Court) to any Government, court, corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of a public duty and in certain cases of a statutory duty.

(b) *Mandamus* distinguished from other writs

Mandamus differs from prohibition and *certiorari* in that while the former can be issued against administrative authority, the latter are available against judicial and quasi-judicial authorities. *Mandamus* acts where the authority declines jurisdiction; prohibition and *certiorari* act where the courts and tribunals usurp jurisdiction vested in them or exceed their jurisdiction. Whereas *mandamus* demands activity, prohibition commands inactivity. While *mandamus* compels, *certiorari* corrects.

Mandamus is a command to a person to do something which is his legal duty, *quo warranto* is directed to a person by what authority he is claiming a public office.

(c) Conditions

A writ of *mandamus* can be issued if the following conditions are satisfied by the petitioner:

87. *State of Mysore v. Chandrasekhara*, AIR 1965 SC 532; *S.I. Syndicate v. Union of India*, (1974) 2 SCC 630; AIR 1975 SC 460.

(i) *Legal right*

The petitioner must have a legal right. Thus, when the petitioner contended that his juniors had been promoted by the Government and he had been left out, and it was found that the petitioner was not qualified for the post, his petition was dismissed.¹

(ii) *Legal duty*

A legal duty must have been imposed on the authority and the performance of that duty should be imperative, not discretionary or optional. There must be in the applicant a right to compel the performance of some duty cast on the opponent.² Thus, if at its own discretion, Government makes a rule to grant dearness allowance to its employees, there is no legal duty and the writ of *mandamus* cannot be issued against the Government for performance of that duty.³ Such a duty must be *statutory*, i.e. one imposed either by the Constitution,⁴ or by any other statute,⁵ or by some rule of common law,⁶ but should not be contractual.⁷ In certain circumstances, however, even if discretionary power is conferred on the authority and the statutory provisions are made for such exercise of the said power, the writ of *mandamus* can be issued for the enforcement of that duty.⁸ Such a duty must be of a *public nature*⁹. If the public authority invested with discretionary power abuses the power,¹⁰ or exceeds it,¹¹ or acts *malafide*,¹² or there is non-application of mind by it,¹³ or irrelevant considerations have been taken into account,¹⁴ the writ of *mandamus* can be issued.

1. *Umakant v. State of Bihar*, (1973) 1 SCC 485; AIR 1973 SC 964.

2. *State of M.P. v. Mandavar*, AIR 1954 SC 493; 1955 SCR 158.

3. *Id.*; *State of Mysore v. Syed Mahmood*, AIR 1968 SC 1113; (1968) 3 SCR 363.

4. *Rashid Ahmed v. Municipal Board*, AIR 1950 SC 163; 1950 SCR 566; *Wazir Chand v. State of H.P.*, AIR 1954 SC 415; 1955 SCR 408.

5. *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610; (1960) 2 SCR 866; *Guruswamy v. State of Mysore*, AIR 1954 SC 592; 1955 SCR 305.

6. *Commr. of Police v. Gordhandas*, AIR 1952 SC 16; 1952 SCR 135.

7. *Lekhraj v. Dy. Custodian*, AIR 1966 SC 334; (1966) 1 SCR 120.

8. *Commr. of Police v. Gordhandas*, (*supra*).

9. *Sohan Lal v. Union of India*, AIR 1957 SC 529; 1957 SCR 738.

10. *State of Punjab v. Ramji Lal*, (1970) 3 SCC 602; AIR 1971 SC 1228; *State of Haryana v. Rajendra*, (1972) 1 SCC 267; AIR 1972 SC 1004.

11. *Calcutta Discount Co. v. ITO*, AIR 1961 SC 372; (1961) 2 SCR 241.

12. *Pratap Singh v. State of Punjab*, AIR 1964 SC 72; (1964) 4 SCR 733; *Rowjee v. State of A.P.*, AIR 1964 SC 962; (1964) 6 SCR 330.

13. *State of Punjab v. Hari Kishan*, AIR 1966 SC 1081; (1966) 2 SCR 982; *Kishori Mohan v. State of W.B.*, (1972) 3 SCC 845; AIR 1972 SC 1749.

14. *Rohtas Industries v. S.D. Agrawal*, (1969) 1 SCC 325; AIR 1969 SC 707; *Manu Bhusan v. State of W.B.*, (1973) 3 SCC 663; AIR 1973 SC 295.

(iii) *Demand and refusal*

The petition for a writ of *mandamus* must be preceded by a demand of justice and its refusal. In *Halsbury's Laws of England*¹⁵, it is stated:

"As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the *mandamus* desires to enforce, and that that demand was met by a refusal."

The above principles are accepted in India also.¹⁶

(iv) *Good faith*

An application for *mandamus* must have been made in good faith and not for any ulterior motive or oblique purpose. A petition for *mandamus* albeit made in good faith, will not be granted if designed to harass the respondent or with a view to wreak personal grievances.¹⁷

(d) *Who may apply*

A person whose right has been infringed may apply for the writ of *mandamus*. Such right must be subsisting on the date of filing the petition.¹⁸ Thus, in case of an incorporated company, the petition must be filed by the company itself.¹⁹ In case any individual makes an application for the enforcement of any right of an institution, he must disclose facts to relate what entitled him to make an application on behalf of the said institution.²⁰

(e) *Against whom mandamus would lie*

A writ of *mandamus* is available against Parliament and legislatures, against courts and tribunals, against the Government and its officers, against local authorities like municipalities, panchayats, against State-owned or State-controlled corporations, against Universities and other educational institutions, against election authorities and against other

15. *Halsbury's Laws of England*, 3rd Edn., Vol. 13, p. 106.

16. *Kamini Kumar v. State of W.B.*, (1972) 2 SCC 420; AIR 1972 SC 2060; *Amrit Lal v. Collector of Central Excise*, (1975) 4 SCC 714; AIR 1975 SC 538; *S.I. Syndicate v. Union of India*, (1974) 2 SCC 630; AIR 1975 SC 460.

17. *Halsbury's Laws of England*, 4th Edn., Vol. 1, para 123, pp. 133-34; *Chhetriya Pradushana Mukti Sangathan Samiti v. State of U.P.*, (1990) 4 SCC 449; AIR 1990 SC 2060.

18. *Kalyan Singh v. State of U.P.*, AIR 1962 SC 1183; 1962 Supp (2) SCR 838.

19. *Charanjit Lal v. Union of India*, AIR 1951 SC 41; 1950 SCR 869.

20. *Raj Rani v. U.P. Govt.*, AIR 1954 All 492.

authorities falling within the definition "State" under Article 12 of the Constitution.

(f) *Against whom mandamus would not lie*

A writ of *mandamus* will not lie against the President or the Governor of a State for the exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.²¹ It will not lie against the State legislature to prevent them from considering enacting a law alleged to be violative of constitutional provisions.²² It will not lie against an inferior or ministerial officer who is bound to obey the orders of his superior. "The writ of *mandamus* will not be granted against one who is an inferior or ministerial officer, bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that capacity." It also does not lie against a private individual or any incorporate body.²³

(g) *Alternative remedy*

A writ of *mandamus* will not be refused on the ground of alternative remedy being available if the petitioner approaches the court with an allegation that his fundamental right has been infringed.²⁴ As discussed above, it is the duty of the High Court to safeguard the fundamental rights of the petitioner and the writ of *mandamus* will be issued. But if the complaint is not about the infringement of any fundamental right, the availability of an alternative remedy may be a relevant consideration. And if an equally efficacious, effective and convenient remedy by way of appeal or revision is available against the impugned order, the court may refuse to issue a writ of *mandamus*. This prerogative remedy is not intended to supersede other modes of obtaining relief provided in statutes. As the Supreme Court of the United States observed: "The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such performance, and *who has no other alternative remedy*."²⁵ (emphasis supplied) But application of this rule is discretionary and does not bar jurisdiction of the court and if the alternative remedy is ineffective,

21. Article 361, Constitution of India.

22. *Narinder Chand v. Lt. Governor, H.P.*, (1971) 2 SCC 747; AIR 1971 SC 2399.

23. *Praga Tools v. Imanuel*, (1969) 1 SCC 585; AIR 1969 SC 1306.

24. *Himmatlal v. State*, AIR 1954 SC 403; 1954 SCR 1122; *State of Bombay v. United Motors*, AIR 1953 SC 252; 1953 SCR 1069.

25. *Robert L. Cutting, Re*, 94 US 14.

inadequate or onerous, the court may not throw away the application for *mandamus* on that ground.²⁶

(h) *Certiorarified mandamus*

A writ of *mandamus* can be issued directing a public authority to perform its duty. A writ of *certiorari*, on the other hand, quashes a decision taken by a court or tribunal if it is without jurisdiction or in excess thereof. In a given case, however, *mandamus* and *certiorari* may be combined. By issuing *certiorari*, a decision can be quashed and simultaneously by issuing *mandamus*, certain directions can also be given. This is known as "*certiorarified mandamus*".²⁷

Thus, where the Government refuses to make reference under Section 10 of the Industrial Disputes Act, 1947, a High Court can issue a writ of *certiorari* quashing that order and at the same time can issue *mandamus* directing the Government to decide the matter afresh or in an appropriate case to make reference.²⁸ Similarly, in spite of statutory provision for renewal of permit for three years if the renewal is granted only for one year, the court not only can quash that order (*certiorari*) but also direct the authority to renew permit for three years (*mandamus*).²⁹

(i) *Conclusions*

The position of *mandamus* in India is indeed very encouraging. It is the most popular writ, extensively and successfully used by aggrieved persons. Since the object of Public Law is to make functioning of administrative bodies in an efficient manner yielding the best results to the State, society and the individuals without undue delay or costs, it is the duty of courts to hold this process through the instrumentality of writs, more particularly by a writ of *mandamus*. It is submitted that the following observations of Baron Martin, J.³⁰ lay down correct proposition of law and, therefore, worth quoting:

"Instead of being astute to discover reasons for not applying this great constitutional remedy for error and mis-government, we think

26. *Himatlal case (supra)*; *Commr. of Police v. Gordhandas*, AIR 1952 SC 16: 1952 SCR 135; *Ram and Shyam v. State of Haryana*, (1985) 3 SCC 267: AIR 1985 SC 1147.

27. Wade: *Administrative Law*, (1994), p. 653; *State of Kerala v. Rashama*, (1979) 1 SCC 572: AIR 1979 SC 765.

28. *State of Bihar v. Ganguly*, AIR 1958 SC 1018: 1959 SCR 1191; *Ram Avtar v. State of Haryana*, (1985) 3 SCC 189: AIR 1985 SC 915.

29. *Maheboob Sheriff v. Mysore State Transport Authority*, AIR 1960 SC 321: (1960) 2 SCR 46.

30. *Rochester Corpn. v. R.*, (1958) 120 EB & E 1024 (1033): 27 LJ QB 434.

it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

III. PROHIBITION

(a) Nature and scope

A writ of prohibition is a judicial writ. It can be issued against a judicial or quasi-judicial authority. When such authority exceeds its jurisdiction or tries to exercise jurisdiction not vested in it. When a subordinate court or an inferior tribunal hears a matter over which it has no jurisdiction, the High Court or the Supreme Court can prevent it from usurping jurisdiction and keep it within its jurisdictional boundaries.³¹

In *East India Commercial Co. v. Collector of Customs*³², the Supreme Court observed:

"A writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise."

The principle underlying the writ of prohibition is that 'prevention is better than cure'.

(b) Prohibition distinguished from other writs

Certiorari and prohibition are judicial writs and are available against courts and Tribunals. In respect of time, however, they differ. The former applies to a decision which is *fait accompli*; the latter seeks to prevent the *fait* from becoming *accompli*.

Prohibition is converse to *mandamus* in that, while *mandamus* compels the authority to do something, prohibition prevents a court or tribunal from doing something which it has no jurisdiction to do so. In other words, *mandamus* demands activity, prohibition commands inactivity.

(c) Grounds

Essentially, both the writs of *certiorari* and prohibition can be issued when an inferior court or tribunal acts without or in excess of its jurisdiction, or acts in violation of principles of natural justice, or acts under a law which is *ultra vires* or acts in contravention of fundamental rights.

31. *East India Commercial Co. Ltd. v. Collector of Customs*, AIR 1962 SC 1893 (1903): (1963) 3 SCR 338; *Govinda Menon v. Union of India*, AIR 1967 SC 1274 (1277): (1967) 2 SCR 566.

32. AIR 1962 SC 1893 (1903): (1963) 2 SCR 338.

(i) *Absence or excess of jurisdiction*

In case of absence or total lack of jurisdiction, writ of prohibition would be available against a judicial or quasi-judicial authority prohibiting it from exercising jurisdiction not vested in it. Thus, in case of levy of licence fee without authority of law, prohibition was issued.³³ Again, if a taxing authority proposes to impose tax on a commodity exempted under the Act, a writ of prohibition can be issued.³⁴ It should, however, be remembered that, such absence or lack of jurisdiction should be patent and apparent on the face of the record and should not be latent and should not ordinarily require for its establishment a lengthy enquiry into questions of fact. Similarly, a distinction must be drawn between lack of jurisdiction and the manner or method of exercising jurisdiction vested in a court or tribunal. Prohibition cannot lie to correct the course, practice or procedure of an inferior court or a tribunal or against a wrong decision on the merits. Therefore, when a tribunal has the jurisdiction to make an order, but in the exercise of that jurisdiction, it commits a mistake whether of fact or of law, the said mistake can only be corrected by an appeal or revision and not by a writ of prohibition³⁵.

(ii) *Violation of natural justice*

A writ of prohibition can also be issued when there is violation of the principles of natural justice. In fact, if the principles of natural justice have not been observed, e.g. if there is bias or prejudice on the part of the Judge or if no notice was issued or hearing given to the person against whom the action is sought to be taken, there is no jurisdiction vested in the court or the tribunal to proceed with such matter.³⁶

(iii) *Unconstitutionality of statute*

A writ of prohibition will also be issued if a court or a tribunal proceeds to act under a law which is *ultra vires* or unconstitutional. Thus, if the proceedings are pending in a court or a tribunal under a statute which itself is *ultra vires* Article 14, or Articles 25 and 26, of the Con-

33. *Abdul Kadir v. State of Kerala*, AIR 1962 SC 922: 1962 Supp (2) SCR 741.

34. *Mathra Parshad v. State of Punjab*, AIR 1962 SC 745: 1962 Supp (1) SCR 913; *Himmatlal v. State of M.P.*, AIR 1954 SC 403: 1954 SCR 1122; *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661: (1955) 2 SCR 603.

35. *Govinda Menon case (supra)*; *Narayana Chetty v. ITO*, AIR 1959 SC 213: 1959 Supp (1) SCR 189; see also *Shyam Behari v. State of M.P.*, AIR 1965 SC 427: (1964) 6 SCR 636; *Abdul Kadir v. State of Kerala*, (*supra*); *Peare Lal v. State of Punjab*, AIR 1958 SC 664 (667): 1959 SCR 438.

36. *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233: (1955) 1 SCR 1104; *Govinda Menon case (supra)*. For detailed discussion about 'Natural Justice', see Lecture VI (*supra*).

stitution or is beyond the competence of the legislature, a writ of prohibition can be issued against further proceedings.³⁷

(iv) *Infringement of Fundamental Rights*

Prohibition can also be issued where the impugned action infringes the fundamental rights of the petitioner. Thus, prohibition was issued against the income tax assessment proceedings where the order by which the proceedings were transferred to another officer was arbitrary and violative of Article 14.³⁸

(d) *Who may apply*

Where the defect of jurisdiction is apparent on the face of the proceedings, an application for prohibition can be brought not only by the aggrieved party but also by a stranger. The principle underlying this rule is that usurpation of jurisdiction is contempt of the Crown and an encroachment upon royal prerogative. Consequently it is immaterial by whom the Court is informed about the usurpation.³⁹

(e) *Against whom prohibition would lie*

A writ of prohibition is a judicial writ. It may be issued against courts, tribunals and other quasi-judicial authorities such as Tax authorities, not Custom Authorities, Settlement Officers, Statutory Arbitrators, etc.

(f) *Against whom prohibition does not lie*

Prohibition, however, does not lie against administrative authorities from discharging administrative, executive or ministerial functions. Likewise, it would not lie against legislature restraining it from enacting or enforcing a law.

(g) *Alternative remedy*

Prohibition is not a writ of course but it is a writ of right and not discretionary.⁴⁰ The existence of another alternative, adequate and equally

37. *STO v. Budh Prakash*, AIR 1954 SC 459; 1955 SCR 1133; *Commissioner v. Lakshmindra*, AIR 1954 SC 282; 1954 SCR 1005; *State of W.B. v. Anwar Ali*, AIR 1952 SC 75; 1952 SCR 284; *Carl Steel v. State of Bihar*, AIR 1961 SC 1615; (1962) 2 SCR SC; *State of Rajasthan v. Rao Manohar*, AIR 1954 SC 297; 1954 SCR 996; *Suraj Mall v. Vishvanatha*, AIR 1954 SC 545; 1955 SCR 448; *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661; (1955) 2 SCR 603.

38. *Bidi Supply Co. v. Union of India*, AIR 1956 SC 479; 1956 SCR 267.

39. *Worthington v. Jeffries*, (1875) LR 10 CP 379 (382); 23 WR 750; *London Corpn. v. Cox*, (1867) LR 2 HL 239 (277-78); 16 WR 44.

40. *Bengal Immunity Co. Ltd. v. State*, AIR 1955 SC 661 (726); (1955) 2 SCR 603.

efficacious remedy is a matter which may be taken into consideration by the High Court in granting a writ of prohibition. But the existence of an alternative remedy is not an absolute bar to the issuance of a writ of prohibition. Therefore, where there is patent lack of jurisdiction in an inferior tribunal, or where the law which confers jurisdiction on such tribunal is itself unconstitutional or *ultra vires*, or there is infringement of any Fundamental Right of the petitioner, the existence of an alternative remedy is altogether irrelevant and the writ of prohibition will be issued as of right.⁴¹

(h) *Limits of prohibition*

- (i) The object of the writ of prohibition is to prevent unlawful assumption of jurisdiction. Therefore, it can be issued only when it is proved that a judicial or quasi-judicial authority has no jurisdiction or it acts in excess of jurisdiction vested in it. Prohibition cannot lie in cases where such authority having jurisdiction exercises it irregularly, improperly or erroneously.⁴²
- (ii) A writ of prohibition can lie only in cases where the proceedings are pending before a judicial or quasi-judicial authority. Thus, when such authority hears a matter over which it has no jurisdiction, the aggrieved person may move a High Court for the writ of prohibition forbidding such authority from proceeding with the matter. But if the proceedings have been terminated and such authority has become *functus officio*, a writ of prohibition would not lie.⁴³ There the remedy may be a writ of *certiorari*.
- (iii) If the proceedings before a judicial or quasi-judicial authority are partly within and partly without jurisdiction, the writ of prohibition may be issued in respect of latter. Thus, if the Collector of Customs imposes invalid conditions for release of certain goods on payment of fine in lieu of confiscation, the writ of prohibition may be issued against the Collector from enforcing illegal conditions.⁴⁴ Similarly, if some proceedings are disposed

41. *Id.* see also *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86; 1958 SCR 595; *Venkateshwaran v. Wadhvani*, AIR 1961 SC 1506; (1962) 1 SCR 753; *Abraham v. ITO*, AIR 1961 SC 609; (1961) 2 SCR 765; *Calcutta Discount Co. v. ITO*, AIR 1961 SC 372; (1961) 2 SCR 241.

42. *Narayana Chetty v. ITO*, AIR 1959 SC 213; 1959 Supp (1) SCR 189.

43. *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233; (1955) 1 SCR 1104.

44. *Sewpujanrai v. Collector of Customs*, AIR 1958 SC 845; 1959 SCR 821.

of and some are still pending, in respect of the pending proceedings, the writ of prohibition may be issued.⁴⁵

(i) *Conclusions*

A writ of prohibition lies where there is absence of jurisdiction or excess of jurisdiction. Hence, if defect of jurisdiction is apparent, it is not only the *power* but the *duty* of superior court to issue this writ to prevent a subordinate court or inferior tribunal from usurping jurisdiction not vested in it or from exceeding it. *A superior court should not be chary of exercising power of prohibition if judicial or quasi judicial authorities attempt to exercise jurisdiction beyond the powers given to them by Parliament.*⁴⁶ (emphasis supplied)

IV. CERTIORARI

(a) *Nature and scope*

'*Certiorari*' means 'to certify'. It is so named as in its original latin form it required "the judges of any inferior court of record to certify the record of any matter in that court with all things touching the same and to send it to the King's Court to be examined". It is an order issued by the High Court to an inferior court or any authority exercising judicial or quasi-judicial functions to investigate and decide the legality and validity of the orders passed by it.⁴⁷

(b) *Object*

The object of the writ of *certiorari* is to keep inferior courts and quasi-judicial authorities within the limits of their jurisdiction; and if they act in excess of their jurisdiction their decisions can be quashed by superior courts by issuing this writ.⁴⁸

(c) *Certiorari distinguished from other writs*

A writ of *habeas corpus* reaches the body but not the record. A writ of *certiorari* always reaches the record but never the body.

Certiorari differs from *mandamus* in that while *mandamus* acts where the Tribunal declines jurisdiction, *certiorari* acts in cases of usurpation or excess of jurisdiction. *Certiorari* corrects while *mandamus* compels to act. Whereas *certiorari* can be issued against judicial or

45. *Hari Vishnu Kamath case*, (*supra*).

46. *Taj Mahal Transporters v. Regional Transport Authority*, AIR 1966 Mad 8: (1965) 2 MLJ 453.

47. *Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251 (275, 289): AIR 1985 SC 167 (185, 190); *Basappa v. Nagappa*, AIR 1954 SC 440: 1955 SCR 250.

48. *Basappa v. Nagappa*, AIR 1954 SC 440 (443); *Prabodh Verma v. State of U.P.* (*supra*).

quasi-judicial authorities, *mandamus* is available against administrative authorities also.

Both prohibition and *certiorari* are judicial writs and are available against subordinate courts and inferior tribunals. There is, therefore, no difference in principle between *certiorari* and prohibition except in respect of timing of the remedy; one before while the other after the decision. Prohibition and *certiorari* are two complementary writs and frequently go hand in hand. A writ of *certiorari* is corrective or remedial whereas a writ of prohibition is preventive. *Certiorari* applies to a decision which is *fait accompli*, prohibition seeks to prevent the fait from becoming *accompli*.⁴⁹

Sometimes both the writs might be necessitated. Thus, in a proceeding before an inferior court, a decision might have been arrived at which did not completely dispose of the matter, in which case it might be necessary to apply both *certiorari* and prohibition. *Certiorari* for quashing what has been decided; and prohibition for restraining further continuance of the proceeding.⁵⁰

(d) Conditions

In *R. v. Electricity Commissioners*⁵¹, Lord Atkin observed:

“Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.”⁵²

From these observations, it becomes clear that a writ of *certiorari* (and prohibition) can be issued if the following conditions are fulfilled:

- (i) The judicial or quasi-judicial body must have legal authority;
- (ii) Such authority must be an authority to determine questions affecting rights of subjects;
- (iii) It must have duty to act judicially; and
- (iv) It must have acted in excess of its authority.

(e) Grounds

A writ of *certiorari* may be issued on the following grounds:

49. C.K. Allen: *Law and Order*, 3rd Edn., p. 267; *Hari Vishnu Kamath v. Ahmed Ishaque*, AIR 1955 SC 233 (241); (1955) 1 SCR 1104; *Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251; AIR 1985 SC 167.

50. *Hari Vishnu Kamath v. Ahmed Ishaque* (*supra*); *Hong Kong and Shanghai Banking Corporation v. Bhaidas*, AIR 1951 Bom 158.

51. (1924) 1 KB 171; 93 LJKB 390.

52. *Id.* at p. 205 (KB). For detailed discussion, see Lecture III (*supra*).

(i) *Error of jurisdiction*

When an inferior court or tribunal acts without jurisdiction, in excess of its jurisdiction or fails to exercise jurisdiction vested in it by law, a writ of *certiorari* may be issued against it.

In *R. v. Minister of Transport*⁵³, even though the Minister was not empowered to revoke a licence, he passed an order of revocation of licence. The order was quashed on the ground that it was without jurisdiction and, therefore, *ultra vires*. Under the provisions of the Industrial Disputes Act, 1947, the appropriate Government is empowered to refer an 'industrial dispute' to a tribunal constituted under the Act. But if the Government refers a dispute to the Industrial Tribunal for adjudication which is not an 'industrial dispute' within the meaning of the Industrial Disputes Act, 1947, the tribunal has no jurisdiction to entertain and decide such dispute⁵⁴. Similarly, in absence of any provision in the relevant statute, after a man is dead, his property cannot be declared as an evacuee property. The decision of the authority would be without jurisdiction⁵⁵.

(ii) *Jurisdictional fact*

Lack of jurisdiction may also arise from absence of some preliminary facts, which must exist before a tribunal exercises its jurisdiction. They are known as 'jurisdictional' or 'collateral' facts. The existence of these facts is a *sine qua non* or a condition precedent to the assumption of jurisdiction by an inferior court or tribunal. To put it simply, the fact or facts upon which an administrative agency's power to act depends can be called a 'jurisdictional fact'. If the jurisdictional fact does not exist, the court or the tribunal cannot act. If an inferior court or a tribunal wrongly assumes the existence of such a fact, a writ of *certiorari* can be issued. The underlying principle is that by erroneously presuming such existence, an inferior court or a tribunal cannot confer upon itself jurisdiction which is otherwise not vested in it under the law.⁵⁶

Thus, in *State of M.P. v. D.K. Jadav*⁵⁷, under the relevant statute all jagirs, including lands, forests, trees, tanks, wells, etc. were abolished and vested in the State. However, all tanks, trees, private wells and buildings on 'occupied land' were excluded from the provisions of the statute.

53. (1934) 1 KB 277; (1933) All ER 604.

54. *Newspapers Ltd. v. State Industrial Tribunal*, AIR 1957 SC 532; 1957 SCR 754.

55. *Ebrahim Aboobaker v. Tek Chand*, AIR 1953 SC 298; 1953 SCR 691.

56. *Raja Anand v. State of U.P.*, AIR 1967 SC 1081; (1967) 1 SCR 373; *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1; (1966) 3 SCR 744.

57. AIR 1968 SC 1186; (1968) 2 SCR 823.

If they were on 'unoccupied land' they stood vested in the State. The Supreme Court held that the question whether the tanks, wells, etc. were on 'occupied' land or on 'unoccupied' land was a jurisdictional fact.

Similarly, in *Shauqin Singh v. Desa Singh*⁵⁸, the relevant statute empowered the Chief Settlement Commissioner to cancel an allotment of land if he was "satisfied" that the order of allotment was obtained by means of 'fraud, false representation or concealment of any material fact'. The Supreme Court held that the satisfaction of the statutory authority was a jurisdictional fact and the power can be exercised only on the existence thereof.

But if an inferior court or a tribunal acts within the jurisdiction vested in it, the writ of *certiorari* cannot be issued against it. In *Ebrahim Aboobakar v. Custodian General*⁵⁹, the Supreme Court observed:

"It is plain that such a writ cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it...."

But if the authority itself is given power to decide the preliminary fact and that authority decides it wrongly, a writ of *certiorari* does not lie. The order can be corrected only in appeal or revision, if it is provided under the relevant statute.

(iii) Error apparent on face of record

If there is an error of law, which is apparent on the face of the record, a decision of an inferior court or a tribunal may be quashed by a writ of *certiorari*.⁶⁰ But such error must be manifest or patent on the face of the proceedings and should not require to be established by evidence. But what is an error of law apparent on the face of the record? What is the distinction between a mere error of law and an error of law apparent on the face of the record? When does an error cease to be a mere error and become an error apparent on the face of the record?

58. (1970) 3 SCC 881; AIR 1970 SC 672.

59. AIR 1952 SC 319(322); 1951 SCR 696.

60. *Veerappa Pillai v. Raman and Raman*, AIR 1952 SC 192; 1952 SCR 583; *Basappa v. Nagappa*, AIR 1954 SC 440; 1955 SCR 250; *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233; (1955) 1 SCR 1104; *Saryanarayan v. Mallikarjun*, AIR 1960 SC 137; (1960) 1 SCR 890; *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621; (1963) 1 SCR 778; *Syed Yakoob v. Radhakrishnan*, AIR 1964 SC 477; (1964) 5 SCR 64; *Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251; AIR 1985 SC 167.

Even though precise, perfect and exhaustive definition is not possible, it may be stated that if an inferior court or a tribunal takes into account irrelevant considerations or does not take into account relevant considerations or erroneously admits inadmissible evidence or refuses to admit admissible evidence or if the finding of fact is based on no evidence, it can be said that there is such an error. In short, "the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record".⁶¹

But an error of fact, 'however grave it may appear to be' cannot be corrected by a writ of *certiorari*. Where two views are possible, if an inferior court or tribunal has taken one view, it cannot be corrected by a writ of *certiorari*. Thus, in *Ujjam Bai v. State of U.P.*⁶², the question was one of interpretation of a notification. By wrongly interpreting the said notification, tax was imposed, which was challenged by the petitioner. The Supreme Court refused to interfere under Article 32 and observed:

"Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, *whether it is wrong in law or in fact.*"⁶³

(emphasis supplied)

But Subba Rao, J. (as he then was) rightly stated: "In a sense he (Sales Tax Officer) acts *without jurisdiction* in taxing goods which are not taxable under the Act."⁶⁴

(emphasis supplied)

(iv) *Violation of natural justice*

A writ of *certiorari* can be issued when there is violation of the principles of natural justice.⁶⁵

(f) *Who may apply*

Normally the party whose rights are affected may apply for a writ of *certiorari*. But if the question affects the public at large, any person may apply. The distinction, however, is that where the application is made by the aggrieved party, the court should grant relief *ex debito jus-*

61. *Syed Yakoob v. Radhakrishnan*, AIR 1964 SC 477 (480); (1964) 5 SCR 64; see also *A.C.C. v. P.D. Vyas*, AIR 1960 SC 665; (1960) 2 SCR 974; *Sk. Mohd. v. Kadalaskar*, (1969) 1 SCC 741; AIR 1970 SC 61.

62. AIR 1962 SC 1621; (1963) 1 SCR 778.

63. *Id.* at p. 1629 (AIR) (per Das, J.).

64. *Id.* at p. 1653 (AIR).

65. For detailed discussion, see Lecture VI (*supra*).

titiae, but if it is made by a party not directly affected in the litigation, grant of writ is entirely in the discretion of the court.⁶⁶

(g) *Against whom certiorari would lie*

A writ of *certiorari* is a judicial writ. It lies against subordinate courts, inferior tribunals, quasi-judicial bodies and adjudicating authorities. Even if the court or tribunal ceases to exist or becomes *functus officio*, *certiorari* can still be issued against it.⁶⁷

(h) *Alternative remedy*

A writ of *certiorari* is a discretionary remedy and the fact that the aggrieved party has another adequate remedy may be taken into consideration and it may not be issued on that ground. But as discussed above, it is a rule of policy, convenience and discretion and not of jurisdiction and in spite of alternative remedy being available it may be issued where the order is on the face of it erroneous or the inferior court or tribunal has acted without jurisdiction or in excess of its jurisdiction or contrary to the principles of natural justice or there is infringement of a fundamental right of the petitioner.

(i) *Limits of certiorari*

An important question of law was raised in *Prabodh Verma v. State of U.P.*⁶⁸ In that case a petition was filed in the High Court of Allahabad under Article 226 of the Constitution for a writ of *certiorari* for declaration that Ordinance 22 (a legislative act) was *ultra vires* and unconstitutional. The High Court granted the relief. The State filed an appeal in the Supreme Court. The Supreme Court held that "a writ of *certiorari* can never be issued to call for the record of papers and proceedings of an Act or Ordinance and for quashing such Act or Ordinance". (Legislative act).

(j) *Conclusions*

A writ of *certiorari* controls all courts, tribunals and other authorities when they purport to act without jurisdiction, or in excess of it. It is also available in cases of violation of the principles of natural justice, or where there is an error of law apparent on the face of the record. Over and

66. *Charanjit Lal v. Union of India*, AIR 1951 SC 41; 1950 SCR 869; *Calcutta Gas Co. v. State of W.B.*, AIR 1962 SC 1044; 1962 Supp (3) SCR 1, *Jashbhai Motibhai v. Roshan Kumar*, (1976) 1 SCC 671; AIR 1976 SC 578.

67. *Hari Vishnu Kamath v. Ahmed Ishaque (supra)*; *Shree Muktajeevandas Trust v. Rudani*, (1989) 2 SCC 691; AIR 1989 SC 1607.

68. (1984) 4 SCC 251; AIR 1985 SC 167 overruling *U.P. Madhyamik Shikshak Sangh v. State of U.P.*, 1979 All LJ 178.

above judicial and quasi judicial bodies, now this writ is also available against administrative orders.⁶⁹

V. *QUO WARRANTO*

(a) *Nature and scope*

'*Quo warranto*' literally means 'what is your authority'. It is a judicial remedy against an occupier or usurper of an independent substantive public office, franchise or liberty. By issuing this writ the person concerned is called upon to show to the court by what authority he holds the office, franchise or liberty. If the holder has no authority to hold the office he can be ousted from its enjoyment. On the other hand, this writ also protects the holder of a public office from being deprived of that to which he may have a right.⁷⁰

(b) *Object*

In *University of Mysore v. Govinda Rao*⁷¹, the Supreme Court observed: "the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen being deprived of public office to which he may have a right."

(c) *Quo warranto distinguished from other writs*

A writ of *habeas corpus* reaches the body, a writ of *quo warranto* reaches an office, franchise or liberty. While *mandamus* is a command to a person or a body under a duty to do something which is his or its legal duty, *quo warranto* is a proceeding by which a person is asked to state by what authority he supports his claim to a particular office. *Certiorari* lies against subordinate courts and inferior tribunals, *quo warranto* is directed against an occupier or usurper of a public office. A writ of prohibition seeks to prevent a court or a tribunal from exercising or exceeding its jurisdiction which is not vested in it. A writ of *quo warranto* seeks to prevent an occupier or usurper of an office which is of a public nature.

(d) *Conditions*

Before the writ of *quo warranto* can be issued the following conditions must be satisfied:⁷²

69. de Smith: *Judicial Review of Administrative Action*, 1995, p. 1002.

70. *University of Mysore v. Govinda Rao*, AIR 1965 SC 491: (1964) 4 SCR 576.

71. AIR 1965 SC 491 (494): (1964) 4 SCR 576.

72. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 435-37.

- (i) The office must be of a public nature. By public office is meant an office in which the public has an interest. Before the writ can be issued the court must be satisfied that the office in question is a public office and the holder thereof has no legal authority to hold the said office. This writ will not lie in respect of office of a private nature, e.g. a managing committee of a private school.
 - (ii) The office must be of a substantive character. The words 'substantive character' means the office in question must be an independent office. The holder of such office must be an independent official and not merely a deputy or servant of others. But the mere fact that the office is held at pleasure will not make the office one which is not substantive. Thus, the membership of the Privy Council, or the office of an Advocate General of a State, or the Governor, though held during the pleasure of the Crown can be said to be of a substantive character:
 - (iii) The office must be statutory or constitutional. Thus, a writ of *quo warranto* may be issued in respect of offices of the Prime Minister, Advocate General, Judge of a High Court, Public Prosecutor, Speaker of a House of the State legislature, members of a Municipal body, University officials, etc.
 - (iv) The holder must have asserted his claim to the office. Mere making of a claim is not enough. But defective swearing can warrant *quo warranto*.
- (e) *Who may apply*

The object of the writ of *quo warranto* is to prevent a person who has wrongfully usurped a public office from continuing in that office. Therefore, an application for a writ of *quo warranto* challenging the legality and validity of an appointment to a public office is maintainable at the instance of any private person even though he is not personally aggrieved or interested in the matter. In *G.D. Karkare v. T.L. Shevde*⁷³, the High Court of Nagpur observed:

"In proceedings for a writ of '*quo warranto*' the applicant does not seek to enforce any right of his as such, nor does he complain of any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office."

73. AIR 1952 Nag 330 (334).

(f) *When may be refused*

Quo warranto is a discretionary remedy and the petitioner cannot claim this writ as of right.⁷⁴ The court may refuse to grant this writ taking into account the facts and circumstances of the case. This may include instances where the issue of a writ would be vexacious, or where there was acquiescence on the part of the petitioner, or where it would be futile as the holder of an office has ceased to hold the office in question. It may also be refused if there is mere irregularity in election.

A writ of *quo warranto* may also be refused on the ground that alternative statutory remedy is available to the petitioner. Thus, when a writ of *quo warranto* was sought to be enforced against a member of the State legislature, it was refused on the ground that there was an alternative remedy by way of making an election petition. But if the objection taken by the petitioner falls outside the statutory remedy, the existence of an alternative will be no bar to the writ of *quo warranto*.

But a writ of *quo warranto* cannot be refused only on the ground of delay. There is an obvious reason behind it. In *Sonu Sampat v. Jalgaon Municipality*⁷⁵, the High Court of Bombay observed:

“If the appointment of an officer is illegal, every day that he acts in that office, a fresh cause of action arises; there can, therefore, be no question of delay in presenting a petition for *quo warranto* in which his very right to act in such a responsible post has been questioned.”

(g) *Alternative remedy*

If an alternative and equally effective remedy is available to the applicant, a writ court may not issue *quo warranto* and relegate him to avail of that remedy. Existence of alternative remedy, however, is not an absolute bar and a writ court has discretion to issue *quo warranto* notwithstanding availability of alternative remedy.⁷⁶

(h) *Delay*

Cause of action for a writ of *quo warranto* is a continuous one (*de dei in dium*). If the appointment of an officer is illegal, every day that he acts in that office, a fresh cause of action arises and a petition cannot be dismissed on the ground of delay.⁷⁷

74. *Rameshwar v. State*, AIR 1961 SC 816: (1961) 2 SCR 874.

75. ILR 1958 Bom 113 (126): (1957) 59 Bom LR 1088 (1096).

76. *Halsbury's Laws of England*, 4th Edn., Vol. I, para 177, p. 167; *Jyoti Prakash v. Chief Justice, Calcutta HC*, AIR 1965 SC 961: (1965) 2 SCR 53.

77. *Baij Nath v. State of U.P.*, AIR 1965 All 151; *Sonu Sampat v. Jalgaon Borough Municipality*, ILR 1958 Bom 113: 59 Bom LR 1088.

(i) *De facto doctrine*

An officer *de jure* is one who, possessing the legal qualifications, has been lawfully chosen to the office in question and has fulfilled all the conditions precedent to the performance of its duties. An officer *de facto* is one who, by some colour of right is in possession of an office for the time being and performs its duties with public acquiescence, though having no right in law.⁷⁸

No one is under an obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers *de facto* cannot be questioned in a court of law. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question.⁷⁹

It should not, however, be forgotten that by application of the *de facto* doctrine, the appointment of an officer *de facto* does not become legal, valid or lawful nor can he be allowed to continue in the said office. As soon as the attention of the court is drawn to the fact that a person who is not entitled to hold a public office is holding the public office contrary to law, it is not only the power but the duty of the court to declare that he is not entitled to hold that office and to restrain him from acting as such.⁸⁰

(j) *Conclusions*

From the above discussion, it becomes clear that an usurper or an intruder cannot be allowed to retain a public office any more. As soon as the attention of the court is drawn to this fact, it is not only the power but the duty of the court to declare that he is not entitled to hold such office and to restrain him from acting as such.⁸¹

3. CONSTITUTIONAL REMEDIES

Under the Constitution of India, the following remedies are available to a person aggrieved by an action of administrative authority:

78. *Gokaraju Rangaraju v. State of A.P.*, (1981) 3 SCC 132: AIR 1981 SC 1473.

79. *Id.* see also *State of Haryana v. Haryana Coop. Transport Ltd.*, (1977) 1 SCC 271: AIR 1977 SC 237; *Pushpadevi v. Wadhwan*, (1987) 3 SCC 366: AIR 1987 SC 1748.

80. *Id.* for detailed discussion and leading cases, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 802-08.

81. *State of Haryana v. Haryana Coop. Transport Ltd.*, (1977) 1 SCC 271(278): AIR 1977 SC 237.

(a) Extraordinary remedies

As already discussed, an aggrieved party has a right to approach the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution of India for an appropriate writ, direction or order. They are extraordinary or prerogative remedies.

(b) Appeals to Supreme Court

Articles 132 to 135 of the Constitution deal with appellate powers of the Supreme Court in constitutional matters and in civil and criminal cases. Article 139A enables the Supreme Court to withdraw or transfer cases from one court to another court.

(c) Special leave petitions⁸²**(i) Constitutional provisions**

Article 136 of the Constitution of India confers extraordinary powers on the Supreme Court to grant special leave to appeal from any judgement, decree, determination, sentence or order passed by any court or tribunal. It reads as under:

“136. *Special leave to appeal by the Supreme Court.*—

- (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
- (2) Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.”

(ii) Object

The rapid growth of administrative law has brought into existence many administrative tribunals and adjudicatory bodies. They are invested with wide judicial and quasi-judicial powers thereby necessitating effective control. With this object in mind, the framers of the Constitution have conferred very wide and extensive powers on the Supreme Court.⁸³

82. I have used the simple expression “*Special leave petitions*” instead of “*Special Leave to appeal by the Supreme Court*” used in Article 136 of the Constitution, since even in the Supreme Court, such petitions are known and described as “*Special Leave Petitions*” (SLPs).

83. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 435-56.

(iii) Nature and scope

This provision confers very wide and plenary powers on the Supreme Court. It is not subject to any limitation. Moreover, as the said power is constitutional, it cannot be diluted or curtailed by ordinary parliamentary process. The article commences with the words 'Notwithstanding anything in this Chapter'. These words indicate that the intention of the Founding Fathers of the Constitution was to disregard in extraordinary cases the limitations contained in the previous articles on the power of the Supreme Court to entertain appeals. The Supreme Court can grant special leave and hear appeals even though no statute makes provision for such an appeal, or under the relevant statute an alternative remedy is provided, or an order passed by the tribunal is made final.

It should, however, be noted that Article 136 does not confer a right on any party but confers a discretionary power on the Supreme Court. In other words, a party cannot approach the Supreme Court under Article 136 *as of right*. The grant of special leave to appeal is, thus, entirely a matter of discretion of the Supreme Court. In short, exercise of power under Article 136 of the constitution is 'pleasurable jurisdiction' of the Supreme Court.

(iv) Extent and applicability

The language of Article 136 is very wide and comprehensive. It vests in the Supreme Court a plenary jurisdiction in matters of entertaining and hearing of appeals by granting special leave against any judgment, decree or order of any court or tribunal in any case or matter. The Article is worded in the widest terms possible.⁸⁴ The powers of the Supreme Court under Article 136 are much wider than the powers of High Courts under Article 226 of the Constitution.⁸⁵ They are special or residuary powers exercisable outside the perview of ordinary law where the needs of justice demand. *'The Constitution for the best reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way.'*⁸⁶ (emphasis supplied)

(v) When Supreme Court may refuse leave

Though this power is comprehensive and undefined, the court has imposed certain limitations upon its own powers. This power is extraor-

84. *Bharat Bank Ltd. v. Employees*, AIR 1950 SC 188: 1950 SCR 459.

85. *Sharma v. State Bank of India*, AIR 1968 SC 985: (1968) 3 SCR 91.

86. *Durga Shankar v. Raghuraj Singh*, AIR 1954 SC 520(522): (1955) 1 SCR 267(273). For detailed discussion see V.G. Ramachandran: *Law of Writs*, (1993), pp. 838-84.

dinary and it should be exercised only in exceptional circumstances. Thus, the Supreme Court would not ordinarily grant a leave against the order of a tribunal where the alternative remedy is available, or finding of fact is challenged, or the matter falls within the discretion of the authority, or where a new point is raised for the first time before the Supreme Court, or where the petitioner is unable to show the presence of special circumstances to grant special leave.⁸⁷

(vi) When Supreme Court may grant leave

On the other hand, in the following circumstances the Supreme Court would entertain the appeal under Article 136: Where the tribunal has acted in excess of jurisdiction or has failed to exercise jurisdiction vested in it; or where there is error apparent on the face of the record; or where the order is against the principles of natural justice; or where irrelevant considerations have been taken into account or relevant considerations have been ignored; or where the findings of the tribunals are perverse; or where there is miscarriage of justice.⁸⁸

(vii) Constitution (42nd) Amendment

The Constitution (42nd Amendment) Act, 1976, radically changed the position. Prior to the amendment, the aggrieved person had other remedies available to him and the Supreme Court in those circumstances rightly did not grant special leave to appeal under Article 136. But by the 42nd Amendment, the High Court's power of superintendence over tribunals were taken away by amending Article 227 and also by adding Articles 323-A and 323-B. Administrative Tribunals were placed 'more or less' in the position of 'final' adjudicatory bodies.⁸⁹

(viii) Constitution (44th) Amendment

Of course, the above position, now no more continues. In view of the Constitution (44th Amendment) Act, 1978 restoring jurisdiction of High Courts over tribunals under Article 227 of the Constitution and after the decision of the Supreme Court in *Chandra Kumar v. Union of India*,⁹⁰ Administrative Tribunals created under Articles 323-A and 323-B of the Constitution have no more remained as 'final' adjudicatory institutions.⁹¹

87. *Id.* see pp. 456-57, 459.

88. *Id.* see pp. 457, 459-60.

89. For detailed discussion, see C.K. Thakker: *Administrative law*, 1996, pp. 250-56, 466; V.G. Ramachandran: *Law of Writs*, 1993, pp. 306-15, 873-74.

90. (1997) 3 SCC 261: AIR 1997 SC 1125.

91. For detailed discussion of 'Administrative Tribunals', see Lecture VII (*supra*).

(ix) Limitation

A petition for special leave to appeal can be filed in the Supreme Court within sixty days from the date of judgement, final order or sentence involving death sentence; or from the date of the refusal of a certificate by the High Court; or within ninety days from the date of the judgement or order sought to be appealed.⁹² An application for special leave filed after the prescribed period may, however, be entertained by the Supreme Court at its discretion, if sufficient cause for condonation of delay is shown.⁹³

(x) Conclusions

It is submitted that the correct principle is laid down by Mahajan, C.J. in *Dhakeswari Cotton Mills v. CIT*⁹⁴, in the following words:

“It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in this court by the constitutional provision made in Article 136. The limitations, whatever they be, are implicit in the nature and the character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. *Beyond that it is not possible to fetter the exercise of this power by any set formula or rule.*”⁹⁵

(emphasis supplied)

(d) Supervisory jurisdiction of High Courts**(i) Constitutional provisions**

Article 227 of the Constitution confers on every High Court the power of superintendence over all the subordinate courts and inferior tribunals in the State. It reads as under:

“227. *Power of Superintendence over all courts by the High Court.*—(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

92. Article 133 (a), (b), (c), Limitation Act, 1963.

93. *Venkataraman v. State of Mysore*, AIR 1958 SC 255; 1958 SCR 895; *Sandhya Rani v. Sudha Rani*, (1978) 2 SCC 116; AIR 1978 SC 537; *Mewa Ram v. State of Haryana*, (1986) 4 SCC 151; AIR 1987 SC 45.

94. AIR 1955 SC 65; (1955) 1 SCR 941.

95. *Id.* at p. 69 (AIR); see also *Bharat Bank v. Employees*, AIR 1950 SC 188(193-94); 1950 SCR 459; *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27(106); 1950 SCR 88; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625(677-78); AIR 1980 SC 1789(1925-26); *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568(574-75); AIR 1981 SC 344(347).

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

- (a) call for returns for such courts;
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
- (c) prescribe forms in which books, entries and accounts shall be kept by the officer of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.”

(ii) Object

The underlying object of this provision to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the authorities mentioned therein. This jurisdiction extends to keeping the subordinate courts and inferior tribunals within the limits of their authority and to seeing that they obey the law and they do what their duty requires and they do it in a legal manner. This jurisdiction cannot be limited or fettered by any Act, except by a constitutional amendment.⁹⁶

(iii) Nature and scope

Article 227 of the Constitution confers on every High Court, a special power and responsibility over all subordinate courts and tribunals within its territorial jurisdiction, with the object of securing that all such institutions exercise their powers and discharge their duties properly and in accordance with law. The power of superintendence over inferior courts and tribunals conferred on High Courts is judicial as well as administrative. The powers conferred by this provision on every High Court is unlimited and unfettered.⁹⁷

96. *Jodhey v. State*, AIR 1952 All 788 (792); 1952 Cri LJ 1282; *State of Gujarat v. Vakhatsinghji*, AIR 1968 SC 1481 (1488); (1968) 3 SCR 692.

97. *Waryam Singh v. Amarnath*, AIR 1954 SC 215; 1954 SCR 565; *Banerji v.*

It should not, however, be forgotten that in exercising the supervisory power, the High Court does not act as a court of appeal. It will not review, re-appreciate or reweigh the evidence upon which the determination of the inferior tribunal purports to be based or to correct errors of fact or even of law and to substitute its own decision for that of the inferior court or tribunal.⁹⁸

(iv) Alternative remedy

The supervisory power under Article 227 is extraordinary in nature and it cannot be claimed as of right by the party. It is in the discretion of the High Court to exercise such power and normally, when alternative remedy is available to the applicant, the High Court may refuse to exercise the power. Thus, the High Court may refuse relief under Article 227, when a remedy by way of appeal or of revision or of election petition or of filing a suit, is available to the applicant.⁹⁹

However, the existence of alternative remedy is not a constitutional bar to the exercise of power under Article 227 and when such an alternative remedy is not equally efficacious, convenient, effective or speedy, the High Court may exercise powers under Article 227. Similarly, the High Court may also interfere under Article 227 in case of absence or excess of jurisdiction, or where there is an error apparent on the face of the record, or in case of violation of the principles of natural justice, or in case of arbitrary or capricious exercise of power or discretion, or where the finding is perverse or patently unreasonable or is based on 'no evidence', or where the inferior court or tribunal does not follow the decision of the High Court of a State, or where there is miscarriage of

Mukherjee, AIR 1953 SC 58; 1953 SCR 302; *Nagendra Nath Bora v. Commr. of Hills Division*, AIR 1958 SC 398; 1958 SCR 1240; *Satyanarayan v. Mallikarjun*, AIR 1960 SC 137; (1960) 1 SCR 890; *State of Gujarat v. Vakhatsinghji*, AIR 1968 SC 1481; (1968) 3 SCR 692; *Ahmedabad Mfg. and Calico Printing Co. Ltd. v. Ram Tahel*, (1972) 1 SCC 898; AIR 1972 SC 1598; *Babhutmal v. Laxmibai*, (1975) 1 SCC 358; AIR 1975 SC 1297; *Trimbak Gangadhar v. Ramchandra Ganesh*, (1977) 2 SCC 437; AIR 1977 SC 1222.

98. *Satyanarayan v. Mallikarjun*, AIR 1960 SC 137; (1960) 1 SCR 890; *State of Orissa v. Murlidhar*, AIR 1963 SC 404; *State of A.P. v. Rama Rao*, AIR 1963 SC 1723; (1964) 3 SCR 25; *Union of India v. H.C. Goel*, AIR 1964 SC 364; (1964) 4 SCR 718; *Lonad Gram Panchayat v. Ramgiri*, AIR 1968 SC 222; (1967) 3 SCR 774.

99. *Maneck Custodji v. Sarafagali*, (1977) 1 SCC 227; AIR 1976 SC 2446; *Bhutnath v. State of W.B.*, (1969) 3 SCC 675; *Major S.S. Khanna v. Brig Dillon*, AIR 1964 SC 497; (1964) 4 SCR 409; *Shankar v. Krishnaji*, (1969) 2 SCC 74; AIR 1970 SC 1; *Nanhoo Mal v. Hira Mal*, (1976) 3 SCC 211; AIR 1975 SC 21.

justice.¹ But if there are two modes of invoking the jurisdiction of the High Court and one of them had been chosen and already exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court.²

(v) *Binding nature of decisions of High Courts*

Article 141 of the Constitution proclaims that "the law declared by the Supreme Court shall be binding on all courts within the territory of India." There is no provision corresponding to Article 141 with respect to the law declared by the High Court. It is, however, well settled that the law declared by the highest court in the State (High Court) is binding on all subordinate courts, inferior tribunals and other authorities falling within the supervisory jurisdiction of the High Court. Judicial discipline requires and decorum known to law warrants that the directions of a High Court should be taken as binding and must be followed. Such obedience would be conducive to their smooth working. Otherwise there would be chaos and confusion in administration of law. In the hierarchial system of courts, it is necessary for each lower tier to accept loyally the decision of the higher tiers.³ As has been rightly stated: "*the judicial system only works if someone is allowed to have the last word and if that last word once spoken, is loyally accepted.*"⁴

(emphasis supplied)

(vi) *Exclusion of Jurisdiction*⁵

(vii) *Conclusions*

The power of judicial review vested in the High Courts under Article 226 of the Constitution is integral and essential feature of the Constitution and a part of basic structure thereof. Likewise, the power of superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of basic structure of the Constitution. The con-

1. *Id.* see also *Nagendra Nath Bora v. Commr. of Hills Division*, AIR 1958 SC 398; 1958 SCR 1240; *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86 (93); 1958 SCR 595; *Ganpat Ladha v. Shashikant*, (1978) 2 SCC 573; AIR 1978 SC 955; *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha*, (1980) 2 SCC 593; AIR 1980 SC 1896.

2. *Shankar v. Krishnaji*, (1969) 2 SCC 74 (78); AIR 1970 SC 1 (4-5).

3. *East India Commercial Co. Ltd. v. Collector of Customs*, AIR 1962 SC 1893; (1963) 3 SCR 338, *Prishnu Ram v. Parag Saikia*, (1984) 2 SCC 488; AIR 1984 SC 898, *Jain Exports v. Union of India*, (1988) 3 SCC 579.

4. *Cassel v. Broom*, (1972) 1 All ER 801 (874); (1972) 2 WLR 645.

5. For detailed discussion, see Lecture VII (*supra*).

stitutional protection afforded to citizens would become illusory if it were left to the executive to determine the legality of its action.⁶

It is well established that the powers conferred on High Courts under Article 227 of the Constitution cannot be limited or circumscribed by any statute. It is submitted that the following observations in *Jodhey v. State*⁷ correctly describe the ambit and extent of supervisory powers of the High Court;

“There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein.”⁸

4. STATUTORY REMEDIES

In addition to the remedies available under the Constitution of India, different statutes also provide remedies to the aggrieved persons. As statutory provisions are not similar with regard to remedies provided, it is not possible to generalise the circumstances in which the said remedies are available. But they may be classified as under:

- (a) Civil suits;
- (b) Appeals to courts; and
- (c) Appeals to tribunals.

(a) Civil suits

This is the traditional remedy available to a person to vindicate his legal right if he is aggrieved by any action of an administrative authority. Section 9 of the Code of Civil Procedure, 1908 declares that courts shall have jurisdiction to try all suits of a civil nature excepting suits in which their cognizance is either expressly or impliedly barred. Thus, if the dispute is of a ‘civil nature’, under Section 9 of the Code, a civil court can entertain, deal with and decide the said dispute, unless the jurisdiction of a civil court is barred either *expressly* or by *necessary implication*. In *Ganga Bai (Smt) v. Vijay Kumar*⁹, the Supreme Court stated:

“There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one’s

6. *Chandra Kumar v. Union of India*, (1997) 3 SCC 261(301-02): AIR 1997 SC 1125.

7. AIR 1952 All 788: 1952 Cri LJ 1282: 1952 All LJ 493.

8. *Id.* at p. 792 (AIR) (Per Nasir Ullah Beg, J.). For detailed discussion of ‘Supervisory Jurisdiction of High Courts’, see V.G. Ramachandran: *Law of Writs*, (1993), pp. 811-37.

9. (1974) 2 SCC 393: AIR 1974 SC 1126.

peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. *A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.*¹⁰ (emphasis supplied)

(b) Appeals to courts

In a number of statutes provisions are made for filing appeals or revisions or making references to 'ordinary' courts of law against the decisions taken by administrative authorities. For example, under the provisions of the Workmen's Compensation Act, 1923, a person aggrieved by the order passed by the Commissioner may file an appeal in the High Court on a 'substantial question of law', or an appeal lies to the High Court against the award made by the Motor Accident Claims Tribunal under the Motor Vehicles Act, 1988, or a reference to the District Court is competent under the Land Acquisition Act, 1894 against the award made by the Land Acquisition Officer, or to the High Court against the order passed by the Income Tax Tribunal under the Income Tax Act, 1961.

(c) Appeals to tribunals

Sometimes a statute creates an appellate tribunal and provides for filing an appeal against orders passed by the administrative officers in exercise of their original jurisdiction. For example, under the Customs Act, 1962, an appeal against the order passed by the Collector of Customs lies to the Central Board of Customs and Excises, or an appeal lies to the Rent Control Tribunal against the order passed by the Rent Controller under the Delhi Rent Control Act, 1958, or to the Copyright Board against any decision of the Registrar of Copyrights under the Copyright Act, 1957. Generally, at this stage, the jurisdiction of the appellate tribunal is not restricted and appeal can be heard on questions of fact and law. In many cases, further appeal on point of law is provided either to a tribunal or to a regular court of law. For example, a second appeal lies to the High Court against the order of the Rent Control Tribunal under the Delhi Rent Control Act, 1958 on substantial questions of law only.

5. EQUITABLE REMEDIES

(a) General

Against any arbitrary action of administrative authorities, generally prerogative remedies are available to the aggrieved persons. But apart from England, U.S.A. and India, the said remedy is not pressed into aid

10. *Id.* at p. 397 (SCC); 1129 (AIR). For detailed discussion, See C.K. Takwani: *Civil Procedure*, 1997, pp. 271-72.

in other countries. Moreover, issue of writs is an extraordinary remedy and is subject to the discretionary power of the court. In these circumstances ordinary equitable remedies can be obtained against the administration. Here, the following remedies are available to the aggrieved person:

- (1) Declaration; and
- (2) Injunction.

(b) Declaration

In a declaratory action, the rights of the parties are declared without giving any further relief. The essence of a declaratory judgment is that it states the rights or the legal position of the parties as they stand, without altering them in any way though it may be supplemented by other remedies in suitable cases. A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not amount to contempt of court.¹¹ The power of a court to render a purely declaratory judgment is particularly valuable in cases where a legal dispute exists but where no wrongful act entitling either party to seek coercive relief has been committed. By making an order declaratory of the rights of the parties the court is able to settle the issue at a stage before the *status quo* is disturbed. Inconvenience and the prolongation of uncertainty are avoided.¹²

In the field of administrative law, the importance of declaratory action cannot be underestimated. de Smith¹³ states: "A public authority uncertain of the scope of powers which it wishes to exercise but which are disputed by another party may be faced with the dilemma of action at the risk of exceeding its powers or inaction at the risk of failing to discharge its responsibilities, unless it is able to obtain the authoritative guidance of a court by bringing a declaratory action. It is equally for the public benefit that an individual whose interests are immediately liable to sustain direct impairment by the conduct of the Administration should be able to obtain in advance a judicial declaration of the legal position."

The distinction between a declaratory order and other judicial order lies in the fact that while the latter is enforceable, the former is not. In private law this is a serious defect; in public law it is insignificant, as 'no administrative agency can afford to be so irresponsible as to ignore an adverse decision of a High Court judge'.¹⁴

11. Wade: *Administrative Law*, 1994, pp. 591-95.

12. de Smith: *Judicial Review of Administrative Action*, 1995, pp. 735-55.

13. *Id.* at p. 735.

14. Garner: *Administrative Law*, 1985, p. 185.

In *Barnard v. National Dock Labour Board*¹⁵, some dock workers had been suspended from employment. Their appeal to the tribunal failed and they were dismissed from employment. In an action for declaration, discovery was ordered. It was revealed at that time that their suspension and dismissal were not in accordance with law. They, therefore, succeeded. Had they applied for *certiorari*, they would probably have failed since *certiorari* was "hedged round by limitations".¹⁶

Similarly, a declaration can be sought by the plaintiff that his nomination paper at a municipal election has been illegally rejected,¹⁷ or that an order compulsorily retiring him is illegal and *ultra vires*.¹⁸

This is a discretionary relief and the object of granting declaration is removal of existing controversy and to avoid chances of future litigation. The courts are not acting as 'advisory' bodies and they can refuse to grant declaration if the question is academic and has not actually arisen. Thus, in *Barnanto, Re*,¹⁹ when trustees desired to ascertain whether, if they took certain steps, the trust fund would be liable to estate duty, and posed a hypothetical question of law, the prayer for declaration was refused. But in *Bai Shri Vaktuba v. Thakore*²⁰, the plaintiff-husband prayed for declaration that a boy aged two years born to the defendant-wife was not his son and to restrain his wife from proclaiming him to be such son and claiming maintenance in that behalf. In spite of the objection by the wife that the suit was premature as neither maintenance nor rights in the plaintiff's property were being claimed, the declaration was granted. But if no controversy has arisen, the court will not grant declaration in vacuum. As early as in 1847, Bruce, V.C.²¹ rightly observed:

"Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this court."²²

15. (1953) 2 QB 18; (1953) 1 All ER 1113; (1953) 2 WLR 995.

16. Wade: *Administrative Law*, 1994, p. 671; see also *Dyson v. Attorney General*, (1911) 1 KB 410; 81 LJB 217; *Vine v. National Dock Labour Board*, (1957) AC 488; (1956) 3 All ER 939; (1957) 2 WLR 106.

17. *Sat Narain v. Hanuman Prasad*, AIR 1946 Lah 85.

18. *Union of India v. Kedareshwar*, AIR 1959 HP 32.

19. (1949) 1 All ER 515; (1949) Ch D 258.

20. ILR (1910) 34 Bom 676.

21. *Clough v. Ratcliffe*, (1847) 1 De G & S 164.

22. *Id.* at pp. 178-79; see also similar observation of Cozens-Hardy, M.R.: "Wait until you are attacked and then raise your defence"; *Dyson v. Attorney General*, (1911) 1 KB 410 (417).

Section 34 of the Specific Relief Act, 1963 provides for a declaratory action in respect of any legal character or any right as to any property where it is questioned.

Generally, a declaration cannot be obtained without praying for consequential relief. The proviso to Section 34 of the Specific Relief Act requires the plaintiff to claim further relief if he can. The object of the said provision is to avoid multiplicity of proceedings. If the consequential reliefs are not claimed by the plaintiff, the suit for declaration is liable to be dismissed.

(c) Injunction

(i) Definition

An injunction is an order of a court addressed to a party to proceedings before it, requiring it to refrain from doing, or to do, a particular act.²³

Injunction is an equitable remedy. It is a judicial process by which one who has invaded, or is threatening to invade the rights, legal or equitable, of another, is refrained from continuing or commencing such wrongful act.²⁴

(ii) Types

Injunctions are of two types:

- (i) Prohibitory injunction; and
- (ii) Mandatory injunction.

Sometimes, prohibitory injunction is also divided into two categories—(a) Temporary injunction, and (b) Perpetual injunction.

(iii) Principles

Generally, injunction is a negative remedy and in administrative law, it is granted when an administrative authority does or purports to do anything *ultra vires*. But in some cases the remedy may be positive and mandatory in nature and an administrative authority may be ordered to do a particular act which it is bound to do. But mandatory injunctions are rare, and in particular they play little part in public law because there is a special procedure for enforcing the performance of a public duty in the prerogative remedy of *mandamus*.²⁵

In the leading case of *Metropolitan Asylum District v. Hill*²⁶, the relevant Act empowered the authority to build a hospital for children for

23. de Smith: *Judicial Review of Administrative Action*, 1995, p. 705.

24. Wade: *Administrative Law*, 1994, p. 581.

25. *Id.* at pp. 585-86.

26. (1881) 6 AC 193; 50 LJ QB 353.

treatment of small-pox. A prohibitory injunction was obtained by the neighbouring inhabitants on the ground of nuisance. Similarly, in *Harrington v. Sendall*²⁷, the plaintiff was not present at a general meeting of the club. A majority of the members, in breach of the rule of the club (which made unanimous concurrence a prerequisite) increased the annual subscription for existing members. As the plaintiff did not pay the increased subscription, he was expelled. An injunction was granted to prevent such expulsion. Likewise, in *Administrator of the City of Lahore v. Abdul Majid*²⁸, the plaintiff submitted a building plan to the municipal authorities for necessary permission. The permission was initially granted but thereafter revoked even though such permission was granted in respect of other buildings. The order of mandatory injunction was issued against the municipal authorities.

An injunction is a discretionary remedy, but the discretion must be exercised judicially. The plaintiff must be 'an aggrieved person'. Since this is an equitable relief it may not be granted if the conduct of the plaintiff disentitles him from the assistance of the court or if some alternative remedy is available to him. But if there is violation of any provision of law, the courts will not hesitate to take the 'drastic step' of issuing an order of injunction, and they will not be deterred by the fact that it will bring the machinery of the Government to a standstill.

In *Bradbury v. London Borough Council*²⁹, a local authority's scheme for setting up comprehensive schools was held to be illegal since no public notice had been given to object as required by the relevant statute. It was contended by the authorities that if the injunction would be granted, there would be administrative chaos. Lord Denning, M.R. stated: "I must say this: If a local authority does not fulfil the requirements of the law, this court will see that it does fulfil them. It will not listen readily to suggestions of 'chaos'. The department of education and the council are subject to the rule of law and must comply with it, just like everyone else. *Even if chaos should result, still law must be obeyed.*"³⁰

(emphasis supplied)

The above principle laid down in *Bradbury* has been followed by the Supreme Court also. In the well-known case of *Prabhakar Rao v.*

27. (1908) 1 Ch 921.

28. ILR 1947 Lah 382. See also *Vaish Degree College v. Lakshmi Narain*, (1976) 2 SCC 58; AIR 1976 SC 888; *Tiwari v. Jawala Devi*, (1979) 4 SCC 160; AIR 1981 SC 122.

29. (1967) 3 All ER 434; (1967) 1 WLR 1311.

30. *Id.* at p. 441 (AER).

*State of A.P.*³¹, the age of superannuation of government servants was reduced from 58 to 55 years. After sometime, however, the Government again restored the age of superannuation to 58 years. But during the interregnum period, certain employees who reached the age of 55 years, retired. They, thus, could not get the benefit of enhanced age of retirement. The question before the court was whether they were entitled to reinstatement and back wages. A contention was raised on behalf of the State Government that 'there would be considerable chaos in the administration if those who have already retired are now directed to be reinducted into service'. The said contention was negated by the court on the principle that 'those that have stirred up a hornet's nest cannot complain of being stung'³².

In India, the law relating to perpetual injunction is discussed in Sections 36, 37 and 38 of the Specific Relief Act, 1963 and mandatory injunction in Section 39 of the said Act, while the law relating to temporary injunction is laid down in Order XXXIX of the Code of Civil Procedure, 1908.³³

6. COMMON LAW REMEDIES

Common law remedies include liability of the Government for the breach of contract and for tortious acts of its servants and employees.³⁴

7. PARLIAMENTARY REMEDIES

England and India are democratic countries having parliamentary form of Government. There is effective control of Parliament over the executive. The Ministers are responsible to Parliament. Garner³⁵ rightly states, the 'natural' remedy open to a subject aggrieved as a consequence of a policy decision taken by an agency of Government, is for him to write to his Member of Parliament in an attempt to obtain redress. The Member may then raise the matter informally with the Minister concerned, or formally in the House of Commons, usually by question or exceptionally on a motion for adjournment of the House, or in the course of a Supply Debate. Where the grievance is considered to be of sufficient public importance, the Member may press for a special court of inquiry to be set up to investigate the matter, under the Tribunals of Inquiry (Evidence) Act, 1921.

31. 1985 Supp SCC 432: AIR 1986 SC 210.

32. *Id.* at p. 462 (SCC): 226 (AIR).

33. For detailed discussion about 'Temporary Injunction', see C.K. Takwani: *Civil Procedure*, 1997, pp. 196-205.

34. For detailed discussion see Lecture X (*infra*).

35. *Administrative Law*, 1985, pp. 81-82.

Even this parliamentary procedure is not free from defects. And though it is an effective instrument in theory, many defects in it are patent in its exercise.

- (i) After the complaint has been made by the aggrieved person to the Member, the result depends very largely on the persistence, ability and status of the said Member.
- (ii) If the Member is of the opposition party, he may attack the Minister vigorously, but his protests would be much milder if he belonged to the ruling party.
- (iii) Again, if the Member is a leader of the opposition party or a member of opposition's 'Shadow Cabinet', there are greater chances of getting substantial results, but it would not be so in case of an 'obscure back-bencher'.
- (iv) In the course of discussion in the House, political considerations may affect the issue to such an extent that the personal element in the original complaint may be forgotten and the complainant may not get appropriate relief.
- (v) There is a wide range of administrative activity and no Minister can be held responsible for decisions taken by public corporations and other local authorities.
- (vi) Even where the ground of complaint falls within the sphere of responsibility of the Minister concerned and he undertakes to investigate the matter, the process of obtaining a remedy is slow and cumbersome. 'Many Members are too busy or preoccupied with other interests, to be able to spare the time to pursue a matter of this kind to any considerable extent. *There are, of course, many exceptions to this observation, but it is certainly no fault of the original complainant if his Member is not one of the exceptions.*³⁶ (emphasis supplied)

8. CONSEIL D'ETAT

In France, there are two types of laws and two sets of courts independent of each other. The ordinary law courts administer the ordinary civil law as between subjects. The administrative courts administer the law as between the subjects and the State. Although, technically speaking *Conseil d'Etat* is a part of the administration, in practice and reality, it is very much a court. The actions of the administration are not immune from judicial control of this institution. It is staffed by Judges and pro-

36. *Id.* at p. 84 (The House of Commons is more a forum for the ventilation of grievances than for securing their redress.)

fessional experts. In fact, *Conseil d'Etat* provides expeditious and inexpensive relief and better protection to the subjects against administrative acts or omissions than the common law courts. It has liberally interpreted the maxim *ubi jus ibi remedium* and afforded relief not only in cases of *injuria sine damno* but also in cases of *damnum sine injuria*.³⁷

9. OMBUDSMAN

(a) Meaning

'Ombudsman' means 'a delegate, agent, officer or commissioner'. A precise definition of 'Ombudsman' is not possible, but Garner³⁸ rightly describes him as "an officer of Parliament, having as his primary function, the duty of acting as an agent for Parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive".

(b) Importance

In *Justice Report*³⁹, it is observed:

"He is not a super-administrator to whom an individual can appeal when he is dissatisfied with the discretionary decision of a public official in the hope that he may obtain a more favourable decision. His primary function ... is to investigate allegations of maladministration."

(c) Historical growth

This institution originated in Sweden in 1809 and thereafter it has been accepted in other countries including Denmark, Finland, New Zealand, England (Parliamentary Commissioner) and India (Lokpal and Lokayukta).

(d) Powers and duties

The Ombudsman inquires and investigates into complaints made by citizens against abuse of discretionary power, maladministration or administrative inefficiency and takes appropriate actions. For that purpose, very wide powers are conferred on him. He has access to departmental files. The complainant is not required to lead any evidence before the Ombudsman to prove his case. It is the function and duty of the Ombudsman to satisfy himself whether or not the complaint was justified. He can even act *suo motu*. He can grant relief to the aggrieved person as unlike the powers of a civil court, his powers are not limited.

37. For detailed discussion see Lecture II (*supra*); see also C.K. Thakker *Administrative Law*, 1996, pp. 472-73.

38. *Administrative Law*, 1985, p. 85.

39. Para 18 (quoted by Garner). *Id.* at p. 85.

(e) Status

Generally, the Ombudsman is a judge or a lawyer or a high officer and his character, reputation and integrity are above board. He is appointed by Parliament and thus, he is not an officer in the administrative hierarchy. He is above party politics and is in a position to think and decide *objectively*. There is no interference even by Parliament in the discharge of his duties. He makes a report to Parliament and sets out reactions of citizens against the administration. He also makes his own recommendations to eliminate the causes of complaints. Very wide publicity is given to those reports. All his reports are also published in the national newspapers. Thus, in short, he is the 'watchdog' or 'public safety valve' against maladministration, and the "protector of the little man".

(f) Defects

Of course, there are some arguments against setting up of the office of the Ombudsman.

- (i) It is argued that this institution may prove successful in those countries which have a comparatively small population, but it may not prove very useful in populous countries, like U.S.A. or India, as the number of complaints may be too large for a single man to dispose of.
- (ii) It is also said that the success of the institution of Ombudsman in Denmark owes a great deal to the personality of its first Ombudsman Professor Hurwitz. He took a keen interest in the complaints made to him and investigated them personally. Prestige and personal contact would be lost if there are a number of such officers, or if there is a single officer who has always to depend upon a large staff and subordinate officers.
- (iii) According to Mukherjea, J.⁴⁰, in India this institution is not suitable. He describes it as "an accusatorial and inquisitorial institution—a combination unprecedented in democracy with traditions of independent judiciary". It is an 'impracticable and disastrous experiment' which will not fit into the Indian Constitution.

(g) Conclusions

In a democratic Government, it is expected that the subjects have adequate means for the redress of their grievances. Since the present judicial system is not sufficient to deal with all cases of injustices, an institution like Ombudsman may help in doing full and complete justice

40. Quoted by S. Rajgopalan: *Administrative Law*, 1970, p. 55.

to aggrieved persons. But Ombudsman is not a "panacea for all the evils of bureaucracy." His success depends upon the existence of a reasonably well-administered State. He cannot cope with the situation where administration is riddled with patronage and corruption.⁴¹

Indian Parliament so far has not enacted any Act though a proposal to constitute an institution of Ombudsman (*Lokpal*) was made by the Administrative Reforms Commission as early as in 1967. Some States, however, have enacted statutes and appointed *Lokayukta*.

10. SELF-HELP

An aggrieved person is also entitled to resist an illegal or *ultra vires* order of the authority. If any person is prosecuted or any action is sought to be taken against him, he can contend that the bye-law, rule or regulation is *ultra vires* the power of the authority concerned. In case of 'purported' exercise of power, he may disobey the order passed against him.

Benjamin Curtis, a former Judge of the Supreme Court of the United States, while arguing before the Senate on behalf of President Andrew Johnson during the latter's impeachment trial, said: "I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is the measure of duty there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to Senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country."⁴²

This view has been adopted by the California Supreme Court. One *Y* entered the country unlawfully. He was, therefore, arrested by the Dy. Sheriff without authority to arrest. *Y* escaped from the custody, and his abettor in the escape was convicted by the lower court. Reversing the order of conviction, the California Supreme Court held that since the order of imprisonment was unlawful, the escape was no offence.

41. Prof. Gellhorn; see also Massey: *Administrative Law*, 1995, p. 373.

42. Kadish and Kadish: *Discretion to Disobey*, quoted in *Nawabkhan v. State of Gujarat (infra)*.

In *Nawabkhan v. State of Gujarat*⁴³, an order of externment was passed against the petitioner on September 5, 1967 under the Bombay Police Act, 1951. In contravention of the said order, the petitioner re-entered the forbidden area on September 17, 1967 and was, therefore, prosecuted for the same. During the pendency of this criminal case, the externment order was quashed by the High Court under Article 226 of the Constitution of India on July 16, 1968. The trial court acquitted the petitioner but the High Court convicted him, because according to the High Court, the contravention of the externment order took place when the order was still operative and was not quashed by the High Court. Reversing the decision of the High Court, the Supreme Court held that as the externment order was illegal and unconstitutional, it was of no effect and the petitioner was never guilty of flouting 'an order which never legally existed'.

In *Stroud v. Bradbury*⁴⁴, the Sanitary Inspector entered the house of the appellant under the provisions of the Public Health Act, 1936. Even though there was a provision regarding giving of prior notice, that requirement was not heeded by the Inspector. The appellant obstructed the entry of the Sanitary Inspector. The court held that the appellant had the right to obstruct the entry of the Inspector as 'the Sanitary Inspector had not done that which the statute required him to do before he had a right of entry'.

But in *Kesho Ram v. Delhi Admn.*⁴⁵, the Section Inspector of the Municipality went to the house of the appellant in the discharge of his duty to seize the appellant's buffalo as he was in arrears of milk tax. The appellant struck the Inspector on the nose causing a fracture. A criminal case was, therefore, filed against the appellant. The appellant's main contention was that the recovery of the tax was illegal inasmuch as no notice of demand as required by the statute was given to him. Negating the contention, the Supreme Court held that the Inspector was acting in good faith and was honestly exercising his statutory duty and had 'sadly' erred in the exercise of his powers. According to the court, the Inspector 'could not be fairly presumed to know that a notice ... must precede any attempt to seize the buffalo' and therefore, the right of private defence was not available to the appellant. Although it appears that *Bradbury* was not brought to the notice of the court, it could have been distinguished on the ground that in that case, the appellant had merely

43. (1974) 2 SCC 121; AIR 1974 SC 1471.

44. (1952) 2 All ER 76.

45. (1974) 4 SCC 509; AIR 1974 SC 1158.

obstructed the entry of the Inspector, whereas in the case before the Supreme Court, the appellant had assaulted the Inspector. Had he merely obstructed the entry of the Section Inspector, probably, relying upon *Bradbury*, he could have justified his action, contending that 'the Section Inspector had not done that which the statute required him to do before he had a right of entry'.

Lecture X
Liability of the Government

The King can do no wrong.

The King must not be under man, but under God and the law, because it is the law that makes the King. —BRACTON

There is no convincing reason why the Government should not place itself in the same position as a private employer subject to the same rights and duties as are imposed by statute. —LAW COMMISSION

S Y N O P S I S

1. Introduction
2. Contractual liability
 - (a) Prior to commencement of Constitution
 - (b) Constitutional provisions
 - (c) Requirements
 - (d) Effect of non-compliance
 - (e) Effect of valid contract
 - (f) Quasi-contractual liability: Doctrine of unjust enrichment
 - (g) Conclusions
 - (h) Contractual liability and writ jurisdiction
3. Tortious liability
 - (a) Doctrine of vicarious liability
 - (b) English law
 - (c) Indian law
 - (i) General
 - (ii) Constitutional provisions
 - (iii) Sovereign and non-sovereign functions
 - (A) Before commencement of Constitution
 - (B) After commencement of Constitution
 - (iv) Test
 - (v) Conclusions
4. Whether State is bound by statute
 - (a) General
 - (b) English law
 - (c) Indian law
5. Doctrine of public accountability
 - (a) General
 - (b) Doctrine explained
 - (c) Illustrative cases
 - (d) Personal liability
 - (e) Limitations

- (f) Judicial accountability
- (g) Conclusions
- 6. Doctrine of estoppel
 - (a) Meaning
 - (b) Nature and scope
 - (c) Illustration
 - (d) Traditional view
 - (e) Modern view
 - (f) Leading cases
 - (g) Estoppel against statute
 - (h) Estoppel and public policy
 - (i) Estoppel and public interest
 - (j) Conclusions
- 7. Crown privilege
 - (a) General
 - (b) England
 - (c) India
 - (i) Statutory provisions
 - (ii) Leading cases
 - (iii) Right to know
 - (iv) Power and duty of courts
 - (v) Considerations
 - (vi) Test
 - (d) Conclusions
- 8. Miscellaneous privileges of Government

1. INTRODUCTION

In England, in the eye of law the Government was never considered as an 'honest man'.¹ Wade² rightly states: "It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the latter part of the nineteenth century onwards made it intolerable for the Government, in the name of the Crown, to enjoy exemption from the ordinary law". English law has always clung to the theory that the King is subject to law and, accordingly, can commit breach thereof. As far as 700 years ago, Bracton had observed: "The King must not be under man, but under God and under the law, because it is the law that makes the King".³

Though theoretically there was no difficulty in holding the King liable for any illegal act, there were practical problems. Rights depend upon remedies and there was no human agency to enforce law against

1. Garner: *Administrative Law*, 1963, p. 215.

2. Wade: *Administrative Law*, 1994, pp. 819-20.

3. "rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem"

the King. All the courts in the country were his courts and he could not be sued in his own courts without his consent. He could be plaintiff but never be made defendant. No writ could be issued nor could any order be enforced against him. As '*the King can do no wrong*', whenever the administration was badly conducted, it was not the King who was at fault but his Ministers, who must have given him faulty advice. But after the Crown Proceedings Act, 1947, the Crown can now be placed in the position of an ordinary litigant.

In India, history has traced different path. The maxim 'the King can do no wrong' has never been accepted in India. The Union and the States are legal persons and they can be held liable for breach of contract and in tort. They can file suits and suits can be filed against them.

2. CONTRACTUAL LIABILITY

(a) Prior to commencement of Constitution

Before commencement of the Constitution also, the liability of the Government for breach of contract was recognised. East India Company was established in India, essentially for commercial activities. As early as in 1785, in *Moodalay v. Morton*⁴, the Supreme Court of Calcutta held that the East India Company was subject to the jurisdiction of the municipal courts in all matters and proceedings undertaken by them as a private trading company.

In a number of statutes also, such liability of the Government had been recognised. Thus, the provisions were made in the Government of India Acts of 1833, 1858, 1915 and 1935.

(b) Constitutional provisions

The contractual liability of the Union of India and States is recognised by the Constitution itself.⁵ Article 298 expressly provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and the acquisition, holding and disposal of property and the making of contracts for any purpose.

Article 299(1) prescribes the mode or manner of execution of such contracts. It reads:

"All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the

4. (1785) 1 Bro CC 469: 28 ER 1245.

5. Arts. 294, 298, 299 and 300, Constitution of India.

Governor by such persons and in such manner as he may direct or authorise.”

(c) Requirements

Reading the aforesaid provision, it becomes clear that Article 299 lays down the following conditions and requirements which must be fulfilled in contracts made by or with the Union or a State:

- (1) All such contracts must be expressed to be made by the President or the Governor as the case may be;
- (2) All such contracts are to be executed by such persons and in such manner as the President or the Governor may direct or authorise; and
- (3) All such contracts made in the exercise of the executive power are to be executed on behalf of the President or the Governor as the case may be.

(1) A contract to be valid under Article 299(1), must be in writing. The words ‘*expressed to be made*’ and ‘*executed*’ in this article clearly go to show that there must be a formal written contract executed by a duly authorised person.⁶ Consequently, if there is an oral contract, the same is not binding on the Government.⁷ This does not, however, mean that there must be a formal agreement properly signed by a duly authorised officer of the Government and the second party. The words ‘*expressed*’ and ‘*executed*’ have not been literally and technically construed. In *Chatturbhuj Vithaldas v. Moreshwar Parashram*⁸, speaking for the Supreme Court, Bose, J. observed:

“It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form....”

In *Union of India v. Rallia Ram*⁹, tenders were invited by the Chief Director of Purchases, Government of India. R’s tender was accepted. The letter of acceptance was signed by the Director. The question before the Supreme Court was whether the provisions of Section 175(3) of the Government of India Act, 1935 (which were in *pari materia* with Article 299(1) of the Constitution of India) were complied with. The Court held

6. *Karamshi Jethabai v. State of Bombay*, AIR 1964 SC 1714.

7. *Id.* see also *Chatturbhuj v. Moreshwar* (*infra*).

8. AIR 1954 SC 236 (243).

9. AIR 1963 SC 1685.

that the Act did not expressly provide for execution of a formal contract. In absence of any specific direction by the Governor-General, prescribing the manner or mode of entering into contracts, a valid contract may result from the correspondence between the parties. The same view was reiterated by the Supreme Court in *Union of India v. N.K. (P) Ltd.*¹⁰, wherein the court observed:

“It is now settled by this court that though the words ‘expressed’ and ‘executed’ in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India.”

(2) The second requirement is that such a contract can be entered into on behalf of the Government by a person authorised for that purpose by the President or the Governor as the case may be. If it is signed by an officer who is not authorised by the President or Governor, the said contract is not binding on the Government and it cannot be enforced against it.

In *Union of India v. N.K. (P) Ltd.*¹⁰, the Director was authorised to enter into a contract on behalf of the President. The contract was entered into by the Secretary, Railway Board. The Supreme Court held that the contract was entered into by an officer not authorised for the said purpose and it was not a valid and binding contract.

In *Bhikraj Jaipuria v. Union of India*¹¹, certain contracts were entered into between the Government and the plaintiff-firm. No specific authority had been conferred on the Divisional Superintendent, East India Railway to enter into such contracts. In pursuance of the contracts, the firm tendered a large quantity of foodgrains and the same was accepted by the Railway Administration. But after some time, the Railway Administration refused to take delivery of goods. It was contended that the contract was not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 and, therefore, it was not valid and not binding on the Government. The Supreme Court, after appreciating the evidence — oral as well as documentary — held that the Divisional Superintendent acting under the authority granted to him could enter into the contracts. The Court rightly held that it was not necessary that such authority could

10. (1973) 3 SCC 388 (394); AIR 1972 SC 915 (919); see also *D.G. Factory v. State of Rajasthan*, (1970) 3 SCC 874; AIR 1971 SC 141.

11. AIR 1962 SC 113; (1962) 2 SCR 880.

be given 'only by rules expressly framed or by formal notifications issued in that behalf'.¹²

In *State of Bihar v. Karam Chand Thapar*¹³, the plaintiff entered into a contract with the Government of Bihar for construction of an aerodrome and other works. After some work, a dispute arose with regard to payment of certain bills. It was ultimately agreed to refer the matter for arbitration. The said agreement was expressed to have been made in the name of the Governor and was signed by the Executive Engineer. After the award was made, the Government contended in civil court that the Executive Engineer was not a person authorised to enter into contract under the notification issued by the Government, and therefore, the agreement was void. On a consideration of the correspondence produced in the case, the Supreme Court held that the Executive Engineer had been '*specially authorised*' by the Governor to execute the agreement for reference to arbitration.

(3) The last requirement is that such a contract must be expressed in the name of the President or the Governor, as the case may be. Thus, even though such a contract is made by an officer authorised by the Government in this behalf, it is still not enforceable against the Government if it is not expressed to be made '*on behalf of*' the President or the Governor.

In *Bhikraj Jaipuria*¹⁴, the contracts entered into by the Divisional Superintendent were not expressed to be made on behalf of the Governor-General. Hence, the Court held that they were not enforceable even though they were entered into by an authorised person.

In *Karamshi Jethabhai v. State of Bombay*¹⁴, the plaintiff was in possession of a cane farm. An agreement was entered into between the plaintiff and the Government for supply of canal water to the land of the former. No formal contract was entered into in the name of the Governor but two letters were written by the Superintending Engineer. The Supreme Court held that the agreement was not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 and, consequently, it was void.

Similarly in *D.G. Factory v. State of Rajasthan*¹⁵, a contract was entered into by a contractor and the Government. The agreement was

12. AIR 1962 SC 113(118). But ultimately the Court found that the contracts were not expressed to be made on behalf of the Governor-General and hence were unenforceable.

13. AIR 1962 SC 110.

14. AIR 1964 SC 1714.

15. (1970) 3 SCC 874; AIR 1971 SC 141. See also *K.P. Chowdhary v. State of*

signed by the Inspector General of Police, in his official status without stating that the agreement was executed 'on behalf of the Governor'. In a suit for damages filed by the contractor for breach of contract, the Supreme Court held that the provisions of Article 299(1) were not complied with and the contract was not enforceable.

(d) Effect of non-compliance

The provisions of Article 299(1) are mandatory and not directory and they must be complied with. They are not inserted merely for the sake of form, but to protect the Government against unauthorised contracts. If, in fact, a contract is unauthorised or in excess of authority, the Government must be safeguarded from being saddled with liability to avoid public funds being wasted. Therefore, if any of the aforesaid conditions is not complied with, the contract is not in accordance with law and the same is not enforceable by or against the Government¹⁶. Formerly, the view taken by the Supreme Court was that in case of non-compliance with the provisions of Article 299(1), a suit could not be filed against the Government as the contract was not enforceable, but the Government could accept the liability by ratifying it.¹⁷ But in *Mulamchand v. State of M.P.*¹⁸, the Supreme Court held that if the contract was not in accordance with the constitutional provisions, in the eye of law, there was no contract at all and the question of ratification did not arise. Therefore, even the provisions of Section 230(3) of the Indian Contract Act, 1872¹⁹ would not apply to such a contract and it could not be enforced against the government officer in his personal capacity.

M.P., AIR 1967 SC 203.

16. *Bhikraj Jaipuria*, (*supra*); *B.K. Mondal*, (*infra*); *K.P. Chowdhary v. State of M.P.*, AIR 1967 SC 203; *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152; *Chatturbhuj*, (*supra*) at p. 243 (AIR).

17. *Chatturbhuj*, (*infra*); *B.K. Mondal*, (*infra*); *Laliteshwar Prasad v. Bateshwar Prasad*, AIR 1966 SC 580; *K.C. Thapar*, (*supra*);
Section 196 of the Indian Contract Act, 1872 reads:

"Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify then, the same effects will follow as if they had been performed by his authority."

18. AIR 1968 SC 1218.

19. Section 230 reads:

"In absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

Such a contract shall be presumed to exist in the following cases:

(1) & (2) * * *

(3) Where the principal, though disclosed cannot be sued."

(e) Effect of valid contract

If the provisions of Article 299(1) are complied with, the contract is valid and it can be enforced by or against the Government and the same is binding on the parties thereto²⁰. Article 299(2) provides that neither the President nor the Governor shall be personally liable in respect of any contract executed for the purpose of the Constitution or for the purpose of any enactment relating to the Government of India. It also grants immunity in favour of a person making or executing any such contract on behalf of the President or the Governor from personal liability.

(f) Quasi-contractual liability: Doctrine of unjust enrichment

As discussed above, the provisions of Article 299(1) of the Constitution [Section 175(3) of the Government of India Act, 1935] are mandatory and if they are not complied with, the contract is not enforceable in a court of law at the instance of any of the contracting parties. In these circumstances, with a view to protecting innocent persons, courts have applied the provisions of Section 70 of the Indian Contract Act, 1872 and held the Government liable to compensate the other contracting party on the basis of quasi-contractual liability. What Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, but on the basis of the fact that something was done by one party for the other and the said work so done has been voluntarily accepted by the other party²¹. Thus, Section 70 of the Contract Act prevents 'unjust enrichment'. This doctrine is explained by Lord Wright in *Fobrosa v. Fairbairn*²² in the following words:

"[A]ny civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within

20. *State of Bihar v. Abdul Majid*, AIR 1954 SC 245; *State of Assam v. K.P. Singh*, AIR 1953 SC 309.

21. *Chatturbhuj*, (*supra*) at p. 301; *B.K. Mondal*, (*infra*); *Mulamchand*, (*supra*).

22. (1942) 2 All ER 122; (1943) AC 32.

a third category of the common law which has been called quasi-contract or restitution."²³

The doctrine applies as much to corporations and the Government as to private individuals. The provision of Section 70 may be invoked by the aggrieved party if the following three conditions are satisfied. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these three conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Thus, in *State of W.B. v. B.K. Mondal*²⁴, at the request of a government officer, the contractor constructed a building. The possession was obtained by the officer and the building was used by the Government, but no payment was made to the contractor. It was contended that as the provisions of Article 299(1) of the Constitution had not been complied with, the contract was not enforceable. The Supreme Court held that the contract was unenforceable but the Government was liable to pay to the contractor under Section 70 of the Indian Contract Act, 1872 on the basis of quasi-contractual liability. Gajendragadkar, J. (as he then was) rightly stated: "In a sense it may be said that Section 70 should be read as supplementing the provisions of Section 175(3) of the Act."²⁵

(g) Conclusions

It is submitted that the following observations of Bose, J.²⁶ lay down correct law on the point: "We feel that some reasonable meaning must be attached to Art. 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form.

23. *Id.* at p. 135 (AER); see also *Mulamchand v. State*, (*supra*).

24. AIR 1962 SC 779; 1964 Supp (1) SCR 876.

25. *Id.* at p. 789 (AIR). See also *Mulamchand v. State of M.P.*, (*supra*); *Piloo Dhunjishaw v. Mun. Corp., Poona*, (1970) 1 SCC 213; AIR 1970 SC 1213; *Hansraj Gupta v. Union of India*, (1973) 2 SCC 637; AIR 1973 SC 2724.

26. *Chatturbhuj Vithaldas v. Moreshwar Parashram*, AIR 1954 SC 236; 1954 SCR 817.

In between is a large class of contracts, probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper form. *It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. If not, its interests are safeguarded as we think the Constitution intended that they should be.*²⁷ (emphasis supplied)

(h) Contractual liability and writ jurisdiction

If a person enters into a contract with the Government and is entitled to certain benefits thereunder, he can approach a court of law. The question, however, is as to whether he can file a petition under Article 32 or under Article 226 of the Constitution of India. In *R.K. Agarwal v. State of Bihar*²⁸, the Supreme Court classified cases of breach of contract in three categories:

- (i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;
- (ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Acts or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and
- (iii) Where the contract entered into between the State and the person aggrieved is not statutory but purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

The first type of obligations were held to be enforceable under Article 226 of the Constitution by applying the doctrine of promissory estoppel.

The second category covers those cases where the contract is entered into between an individual and the State in the exercise of some statutory power. In these cases, the breach complained of is of a statutory obligation. In such cases, an action of public authority is challenged and hence, a petition²⁹ is maintainable.

27. *Chatturbhuj Vithaldas v. Moreswar Parashram*, AIR 1954 SC 236, 243: 1954 SCR 817.

28. (1977) 3 SCC 457: AIR 1977 SC 1496.

With regard to the third category of cases, the rights of the parties flow from mere terms of the contract entered into by the State and a party to such contract cannot invoke writ jurisdiction of the Supreme Court under Article 32 or of a High Court under Article 226 of the Constitution of India.

3. TORTIOUS LIABILITY

(a) Doctrine of vicarious liability

Since the State is a legal entity and not a living entity, it has to act through human agency, i.e. through its servants. When we discuss the tortious liability of the State, it is really the liability of the State for the tortious acts of its servants that has to be considered. In other words, it refers to when the State can be held vicariously liable for the wrongs committed by its servants.

Vicarious liability refers to a situation where one person is held liable for act or omission of other person. Winfield²⁹ explains the doctrine of vicarious liability thus: "The expression 'vicarious liability' signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship". Thus, the master may be held liable for the torts committed by his servant in the course of employment.

The doctrine of vicarious liability is based on two maxims:

- (i) *Respondeat superior* (let the principal be liable); and
- (ii) *Qui facit per alium facit per se* (he who does an act through another does it himself).

As early as in 1839,³⁰ Lord Brougham observed:

"The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

The doctrine of vicarious liability is based on 'social convenience and rough justice'.³¹

29. *The Law of Tort*, 1971, p. 525.

30. *Duncan v. Finlater*, (1839) 6 Cl & F 894 (910).

31. Per Lord Pearce in *ICI Ltd. v. Shatwell*, (1965) AC 656 (686). See also Salmond: *The Law of Torts*, 1973 p. 461; Winfield: *The Law of Tort*, 1971, p. 525.

There is no reason why this doctrine should not be applied to the Crown in respect of torts committed by its servants. In fact, if the Crown is not held vicariously liable for such torts, the aggrieved party, even though it had sustained a legal injury, would be without any effective remedy, inasmuch as the government servant may not have sufficient means to satisfy the judgment and decree passed against him.³²

(b) English law

In England, under common law, absolute immunity of the Crown was accepted and the Crown could not be sued in tort for wrongs committed by its servants in the course of their employment. The rule was based upon the well-known maxim of English law "the King can do no wrong". In 1863, in *Tobin v. R.*³³, the court observed: "If the Crown were liable in tort, the principle (the King can do no wrong) would have seemed meaningless". But with the increase of governmental functions, the immunity afforded to the Crown in tortious liability proved to be incompatible with the demands of justice. The practice of general immunity was very much criticised by Prof. Dicey³⁴, by the Committee on Ministers' Powers³⁵ and by the House of Lords in *Adams v. Naylor*³⁶. Dicey gave what he described as an 'absurd example'. "If the Queen were herself to shoot the P.M. through the head, no Court in England could take cognizance of the act". Really, the meaning of the maxim "the King can do no wrong" would mean "King has no legal power to do wrong." But the English Law never succeeded in distinguishing effectively between the King's two capacities—personal and political.³⁷ The time had come to abolish the general immunity of the Crown in tort, and in 1947, the Crown Proceedings Act was enacted. This Act placed the Government in the same position as a private individual. Now, the Government can sue and be sued for tortious acts.

32. It should be borne in mind that what we are discussing here is the immunity of the State from the doctrine of vicarious liability and not the immunity of the government servants from his personal liability to compensate the aggrieved party. Of course, some statutes grant such immunity to the government servant in respect of an act done by him in good faith in the official capacity, e.g. S. 40, Indian Arms Act, 1950; S. 159, Bombay Police Act, 1951, etc.

33. (1863) 14 CBNS 505. See also *Feather v. R.*, (1865) 6 B & S 257; *Bainbridge v. Post Master-General*, (1906) 1 KB 178; *Royster v. Cavey*, (1946) 2 All ER 646; *Adams v. Naylor*, (1946) 2 All ER 241; (1947) KB 204; (1946) AC 543.

34. *Law and the Constitution*, 10th Edn., pp. 24-26.

35. Cmd. 4060 (1932), p. 112.

36. (1946) AC 543; (1947) KB 204; (1946) 2 All ER 241.

37. Wade: *Administrative Law*, 1994, p. 821.

(c) Indian law**(i) General**

So far as Indian law is concerned, the maxim "the King can do no wrong" was never fully accepted. Absolute immunity of the Government was not recognised in the Indian legal system even prior to the commencement of the Constitution and in a number of cases, the Government was held liable for tortious acts of its servants.

(ii) Constitutional provisions

Under Article 294(b) of the Constitution, the liability of the Union Government or a State Government may arise 'out of any contract or otherwise'. The word 'otherwise' suggests that the said liability may arise in respect of tortious acts also. Under Article 300(1), the extent of such liability is fixed. It provides that the liability of the Union of India or a State Government will be the same as that of the Dominion of India and the Provinces before the commencement of the Constitution. It is, therefore, necessary to discuss the liability of the Dominion and the Provinces before the commencement of the Constitution of India.

(iii) Sovereign and non-sovereign functions**(A) Before commencement of Constitution**

The English law with regard to immunity of the Government for tortious acts of its servants is partly accepted in India also. As observed by the High Court of Calcutta in *Steam Navigation Co.*³⁸, 'as a general rule this is true, for it is an attribute of sovereignty, and a universal law that a State cannot be sued in its own courts without its consent'. Thus, a distinction is sought to be made between 'sovereign functions' and 'non-sovereign functions' of the State. In respect of the former, the State is not liable in tort, while in respect of the latter, it is. Let us try to understand the distinction between sovereign and non-sovereign functions with reference to some concrete cases on the point:

*Peninsular and Oriental Steam Navigation Co. v. Secretary of State*³⁹ is considered to be the first leading case on the point. In this case, a servant of the plaintiff-company was taking a horse-driven carriage belonging to the company. While the carriage was passing near the government dockyard, certain workmen employed by the Government, negligently dropped an iron piece on the road. The horses were startled and one of them was injured. The plaintiff-company filed a suit against

38. *Peninsular and Oriental Steam Navigation Co. v. Secretary of State*, (1861) 5 Bom HCR App 1.

39. (1861) 5 Bom HCR App 1.

the defendant and claimed Rs 350 as damages. The defendant claimed immunity of the Crown and contended that the action was not maintainable. The High Court of Calcutta held that the action against the defendant was maintainable and awarded the damages. The court pronounced:

“There is a great and clear distinction between acts done in the exercise of what are usually termed as sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.”

Holding the Government liable, the court further observed: “The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable.”⁴⁰

From the aforesaid observations of the court, it is clear that the court classified the acts of the Secretary of the State into two categories — (i) sovereign acts; and (ii) non-sovereign acts. In respect of the former category of acts, the Secretary of State was not liable, but in respect of the latter category of acts, he was. As the impugned act fell within the second category, the action was maintainable.

(B) After commencement of Constitution

In *State of Rajasthan v. Vidhyawati*⁴¹, a jeep was owned and maintained by the State of Rajasthan for the official use of the Collector of a district. Once the driver of the jeep was bringing it back from the workshop after repairs. By his rash and negligent driving of the jeep a pedestrian was knocked down. He died and his widow sued the driver and the State for damages. A Constitution Bench of the Supreme Court held the State vicariously liable for the rash and negligent act of the driver. The court after referring to the *Steam Navigation Co.* did not go into the wider question as to whether the act was a sovereign act or not. But it held that the rule of immunity based on the English law had no validity in India. After the establishment of a Republican form of Government under the Constitution there was no justification in principle or in public interest, that the State should not be held liable vicariously for the tortious acts of its servants.

It is submitted that the law has been rightly laid down by the Supreme Court in *Vidhyawati*. Unfortunately, however, within a very short time, a clear departure was made in *Kasturi Lal*⁴² and the efficacy of the law

40. (1861) 5 Bom HCR APP 1, 14-15.

41. AIR 1962 SC 933 (940).

42. *Kasturi Lal v. State of U.P.*, AIR 1965 SC 1039: (1965) 1 SCR 375.

laid down in *Vidhyawati* was considerably watered down by the Supreme Court.

In *Kasturi Lal v. State of U.P.*,⁴³ a certain quantity of gold and silver was attached by police authorities from one *R* on suspicion that it was stolen property. It was kept in Government *malkhana* which was in the custody of a Head Constable. The Head Constable misappropriated the property and fled to Pakistan. *R* was prosecuted but acquitted by the court. A suit for damages was filed by *R* against the State for the loss caused to him by the negligence of police authorities of the State. The suit was resisted by the State. Following the ratio laid down in *Steam Navigation Co.*, the Supreme Court held that the State was not liable as police authorities were exercising 'sovereign functions'. Speaking for a Constitution Bench of the court, Gajendragadkar, C.J. observed:

"If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie."⁴⁴

Distinguishing *Vidyawati*, the court held that; "when the government employee was driving the jeep car from the workshop to the Collector's residence for the Collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or governmental powers of the State.... In fact, the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all. *That is the basis on which the decision must be deemed to have been founded...*"⁴⁵ (emphasis supplied). Thus, as observed by the Supreme Court in a subsequent case⁴⁶: "the shadow of sovereign immunity still haunts the private law, primarily, because of absence of legislation."

43. AIR 1965 SC 1039: (1965) 1 SCR 375.

44. *Id.* at p. 1046 (AIR).

45. *Id.* at p. 1048 (AIR).

46. *Nagendra Rao v. State of A.P.*, (1994) 6 SCC 205 (226).

It appears that the Supreme Court itself was satisfied that *Kasturi Lal* did not lay down correct proposition of law and in these circumstances, in subsequent cases either the court did not refer *Kasturi Lal* at all or *conveniently* distinguished it by describing it as 'not relevant'.

Thus, in *State of Gujarat v. Memon Mahomed Haji Hasan*⁴⁷, certain goods of the respondent were seized by the Customs Authorities under the provisions of the Customs Act, 1962, *inter alia* on the ground that they were smuggled goods. An appeal was filed against that order by the respondent. During the pendency of the appeal the goods were disposed of under an order passed by the Magistrate. The appeal filed by the respondent was allowed and the order of confiscation was set aside and the authorities were directed to return the goods. In an action against the Government, the Supreme Court held that the Government was in a position of a bailee and was, therefore, bound to return the goods. The court observed:

"Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, *the position of the State Government until the order became final would be that of a bailee.*"⁴⁸

(emphasis supplied)

The same view was again reiterated by the Supreme Court in *Basavva Patil v. State of Mysore*⁴⁹. It is, however, worthwhile to note that in *Basavva Patil*, the court did not refer to any of the three cases, namely: *Vidhyawati*, *Kasturi Lal* or *Memon Mahomed*. In *Basavva Patil*, some ornaments were stolen from the house of the appellant. They were recovered by the police authorities in the course of investigation and produced before the criminal court. The goods were retained by the police authorities under the order of the court. The goods were, however, stolen from police custody before the disposal of the case. After the final disposal of the criminal proceedings, the appellant applied under the Code of Criminal Procedure, 1898⁵⁰, for return of the ornaments or their equivalent value. The application of the appellant was rejected by the Magis-

47. AIR 1967 SC 1885: (1967) 3 SCR 938.

48. *Id.* at p. 1889 (AIR).

49. (1977) 4 SCC 358: AIR 1977 SC 1749.

50. S. 517.

trate on the ground that the goods had not reached the custody of the court. The said order was confirmed by the Sessions Court and the High Court of Mysore. The Supreme Court set aside the orders passed by the courts below and ordered the State to pay cash equivalent of the property to the appellant.

It is true that in this case, the application was filed under the Code of Criminal Procedure and thus, the proceedings were criminal in nature, but in almost similar circumstances in *Kasturi Lal* the civil action failed on the ground that the act involved was a 'sovereign function'. It is also important to note that *Kasturi Lal* was not even referred to by the Supreme Court, though the High Court⁵¹ had decided the matter relying on *Kasturi Lal*.

A reference may also be made to a decision of the Supreme Court in *Nagendra Rao v. State of A.P.*⁵² In that case, certain goods were ordered to be confiscated. Confiscation having been set aside, the appellant sued for return of goods or for realisation of price. The trial court decreed the suit but the High Court set aside the decree. The appellant approached the Supreme Court.

Allowing the appeal and setting aside the judgement of the High Court, the Supreme Court held that when the confiscation was held to be illegal, the appellant was entitled to the price of the goods with interest thereon. Referring to *Memon Mahomed Haji, B.K.D. Patil* and several English and Indian decisions, the Court observed that sovereign immunity cannot be a defence where the State is involved in commercial activities nor it can apply where its officers are guilty of interfering with life and liberty of a citizen not warranted by law. In such cases, the State is vicariously liable and morally, legally and constitutionally bound to compensate and indemnify the wronged person.

The Court also stated that distinction between sovereign and non-sovereign power no more exists. It all depends on the nature of the power and manner of its exercise. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The demarcating line between sovereign and

51. *Basavva Patil v. State*, 1971 Cr LJ 566 (Mys); see also B.B. Pande: "Governmental Liability for the Goods lost in Custody"; (1977) 4 SCC (Jour.), p. 13.

52. (1994) 6 SCC 205.

non-sovereign powers for which no rational basis survives has largely disappeared. *Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, there is no reason to hold that it would not be maintainable against the State.*⁵³

(emphasis supplied)

(iv) Test

From the above discussion, the principle which emerges is that if the function involved is a 'sovereign function', the State cannot be held liable in tort, but if it is a 'non-sovereign function', the State will be held liable. But the difficulty lies in formulating a definite test or criterion to decide to which category the act belongs. In fact, it is very difficult to draw a distinction between the two. "The watertight compartmentalisation of the State's functions into sovereign and non-sovereign or governmental and non-governmental is unsound and highly reminiscent of the *laissez faire* era."⁵⁴

Thus, on the one hand, it could have been argued in *Kasturi Lal*, that the act of keeping another's goods was that of a bailment, which could be undertaken by a private person also and in fact, in *Memon Mahomed* on similar facts, the impugned act was held to be a bailment. On the other hand, in *Vidhyawati*, it could have been argued that as the vehicle was maintained for the use of a Collector, who was an administrator and also a District Magistrate and had police duties to perform, it was a 'sovereign function'.⁵⁵

The test whether the act in question could have been performed only by the Government or also by a private individual is also not helpful in deciding the issue. In a welfare State, the governmental functions have increased and today, not all the functions performed by the Government are sovereign functions; e.g. commercial activities like the running of the Railways.

It is also said that if the act in question is statutory, it may be regarded as a sovereign function, but it is a non-sovereign function if it is non-statutory. But this test is also defective. An activity may be regarded as sovereign even though it has no statutory basis (power to enter into a treaty with a foreign country) and conversely, it may be regarded as

53. (1994) 6 SCC 205(235-36).

54. Alice Jacob: "Vicarious Liability of Government in Torts", 1965, 7 JILI p. 246 (247); see also *Nagendra Rao v. State of A.P.*, (1994) 6 SCC 205 (235).

55. Jain and Jain: *Principles of Administrative Law*, 1986, p. 775.

non-sovereign even though it has a statutory basis (running of Railways).⁵⁶

Moreover, sometimes a particular act may be held to be a sovereign function by one court but non-sovereign by another. For example, running of the Railways was held to be a sovereign function by the High Court of Bombay,⁵⁷ but non-sovereign by the High Court of Calcutta⁵⁸ and this may lead to further uncertainty in law.

Further, the traditional doctrine of sovereign immunity has no relevance in the modern age when the concept of sovereignty itself has undergone drastic change. The old and archaic concept of sovereignty no longer survives. Sovereignty now vests in the people. Hence, even such actions of the Government which are solely concerned with relations between two independent States are now amenable to scrutiny by courts.⁵⁹

Sometimes the distinction between sovereign and non-sovereign functions is categorised as regal and non-regal functions. The former is confined to legislative, executive and judicial power whereas the latter can be characterised as analogous to private company. In the former, the Government is not liable but in the latter, it is liable.⁶⁰

Again, the concept of public interest has also undergone change. No legal or political system today can place the State above law and can deprive its citizens of life, liberty or property by negligent acts of its officers without providing any remedy.⁶¹

Even if the governmental functions can be classified into one or the other category, the principle is unsatisfactory from yet another viewpoint. Generally in a civil action in tort, the principal idea is to compensate the aggrieved person and not to penalize the wrongdoer or his master. And if in compensating the aggrieved party, the wrongdoer or his master has to pay damages, the resultant burden on the latter is merely incidental and not by way of penalty. It is, therefore, absurd and really inhumane to hold that the Government would not be liable if a military truck supplying meals to military personnel struck a citizen, but it would be liable

56. *Id.*, see also *Assn. Pool v. Radhabai*, AIR 1976 MP 164; *Satya Narain v. Distt. Engineer*, AIR 1962 SC 1161.

57. *Bata Shoe Co. v. Union of India*, AIR 1954 Bom 129.

58. *Maharaja Bose v. G.G.-in-Council*, AIR 1952 Cal 242; Ultimately, in *Union of India v. Ladulal Jain*, the Supreme Court held it to be a non-sovereign function, AIR 1963 SC 1681; see also *Satya Narain v. Distt. Engineer*, AIR 1962 SC 1161; *Shyam Sunder v. State of Rajasthan*, (1974) 1 SCC 690; AIR 1974 SC 890.

59. *Nagendra Rao v. State of A.P.*, (1994) 6 SCC 205, 227, 234.

60. *Id.* at p. 234 (SCC).

61. *Id.* at p. 235 (SCC).

if such an accident occurred when the truck carried coal to an army headquarters.

(v) *Conclusions*

Recent judicial trend is, undoubtedly, in favour of holding the State liable in respect of tortious acts committed by its servants. In cases of police brutalities, wrongful arrest and detention, keeping the undertrial prisoners in jail for long periods, committing assault or beating up prisoners, etc. the courts have awarded compensation to the victims or to the heirs and legal representatives of the deceased. As a matter of fact, the courts have severely criticised the inhuman attitude adopted by the State officials.⁶²

So far as *Kasturi Lal* is concerned, it was a case decided by a Bench of five Judges and all earlier as well as subsequent cases were decided by a Bench of less than five Judges. In these circumstances, *Kasturi Lal* could not be overruled and though technically it can be said to be a *good law*, looking to *Memon Mahomed*, *Basavva Patil*, *Nagendra Rao* and other cases, it is clear that the *ratio* laid down in *Kasturi Lal* is watered down substantially.

The Law Commission also stated: "The old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State."⁶³

Prof. Friedman also stated: "It is increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities engages in activities of a commercial, industrial or managerial character. *The proper test is not an impracticable distinction between governmental or non-governmental functions but the nature and form of the activity in question.*"⁶⁴ (emphasis supplied)

It is submitted that the following observations of the Law Commission lay down correct proposition of law:

"There is no convincing reason why the Government should not place itself in the same position as a private employer subject to the same rights and duties as are imposed by statute."⁶⁵

62. For decided cases, see C.K. Thakker: *Administrative Law*, 1996, pp. 601-04.

63. Law Commission of India: First Report, 1956 (*Liability of the State in Tort*), pp. 35-36. See also observations of Mathew, J. in *Shyam Sunder v. State*, (1974) 1 SCC 690 (695); AIR 1974 SC 890 (893-94).

64. Cited in *Nagendra Rao v. State of A.P.* (*supra*), at p. 240 (SCC).

65. Law Commission of India: First Report, 1956, (*Liability of the State in Tort*),

4. WHETHER STATE IS BOUND BY STATUTE

(a) General

As discussed in preceding lectures, the governmental functions have increased. Today, the State performs not only the 'law and order' functions, but as a 'Welfare State', it performs many non-sovereign and commercial activities also. The important question therefore arises, whether the State is subject to the same rights and liabilities which the statute has imposed on other individuals. In other words, whether the State is bound by a statute, and if it is, to what extent the provisions of a statute can be enforced against the State. Let us discuss this point with reference to English law and then Indian law.

(b) English law

According to the general principles of common law, 'no statute binds the Crown unless the Crown was expressly named therein'.⁶⁵ But the aforesaid rule is subject to one exception. As it has often been said, the Crown may be bound by a statute 'by necessary implication'.⁶⁷ Thus, as Wade⁶⁸ states, 'an Act of Parliament is presumed not to bind the Crown in the absence of express provision or necessary implication'. In England, the Crown enjoys the common law privilege and it is not bound by a statute, unless 'a clear intention to that effect appears from the statute itself or from the express terms of the Crown Proceedings Act, 1947'. This principle is based on the well-known maxim 'the King can do no wrong'. In theory, it is inconceivable that the statute made by the Crown for its subjects could bind the Crown itself. This general principle of the common law is preserved even under the provisions of the 1947 Act.⁶⁹

(c) Indian law

The above principle of common law was accepted in India and applied in some cases.

*Province of Bombay v. Municipal Corpn. of the City of Bombay*⁷⁰ is the leading case on the point before independence. The Corporation of Bombay wanted to lay water mains through land which belonged to the Government. The Government agreed to the said proposal upon certain

p. 36. See also observations of Mathew, J. in *Shyam Sunder v. State*, (1974) 1 SCC 690 (695): AIR 1974 SC 890 (893-94).

66. "Roy n'est lie par ascum statute si il ne soit expressment nosme."

67. *Province of Bombay v. Municipal Corpn. of the City of Bombay*, AIR 1947 PC 34: (1947) AC 58: 73 IA 271 (PC).

68. *Administrative Law*, (1994), p. 839.

69. S. 40(2)(f) Crown Proceedings Act, 1947.

70. AIR 1947 PC 34: (1947) AC 58: 73 IA 271 (PC).

conditions. The said land was acquired by the Crown under the provisions of the Municipal Act. Under the provisions of the Municipal Act, the municipality had power 'to carry water mains within or without the city'. The question was whether the Crown was bound by the statute, viz. the Municipal Act. Following the English law, the Privy Council held that the Government was not bound by the statute.

In *Director of Rationing v. Corpn. of Calcutta*⁷¹ — (*Corpn. of Calcutta I*), the Director of Rationing of the Food Department, West Bengal used certain premises for storing rice, flour, etc. Though under the relevant Act a licence was required to be taken from the Corporation of Calcutta for such premises, it was not taken by the Director. He was, therefore, prosecuted by the Corporation. The question before the Supreme Court was whether the State was bound by the statute. The Court by a majority of 4: 1 held that the Director was not liable as 'the State is not bound by a statute, unless it is so provided in express terms or by necessary implication'.

Wanchoo, J. (as he then was), however, did not agree with the majority view. In a dissenting judgment, His Lordship observed:

"In our country the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Part III thereof as well as by other provisions in other parts. It is to my mind inherent in the conception of the Rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all power — executive, legislative and judicial — has disappeared, and in our Constitution, sovereign power has been distributed among various organs created thereby, it seems to me that there is neither justification nor necessity for continuing rule of construction based on the royal prerogative."⁷²

In *Superintendent and Remembrancer of Legal Affairs, W.B. v. Corpn. of Calcutta (Corporation of Calcutta II)*⁷³, the State was carrying on the trade of a daily market without obtaining a licence as required by the relevant statute. The Corporation filed a complaint against the State. When the matter came up for hearing before the Supreme Court, the point was already covered by the judgment of the court in *Corporation of Calcutta I*. The Supreme Court was called upon to decide the correctness or otherwise of the aforesaid decision in *Corporation of Calcutta I*. By a majority of 8: 1, the decision in *Corporation of Calcutta I* was overruled and it was held that the State was bound by the statute.

71. AIR 1960 SC 1355: (1961) 1 SCR 158.

72. *Id.* at pp. 1365-66 (AIR).

73. AIR 1967 SC 997.

It is submitted that the majority view is correct and is in consonance with the doctrine of Rule of Law and Equality enshrined in the Constitution of India. We have no Crown. The archaic rule based on Royal prerogative and perfection of the Crown has no relevance to a democratic republic like India. The Law Commission has also suggested that the common law rule should not be followed in India.⁷⁴ Even in England, its survival is 'due to little but the *vis inertiae*'⁷⁵.

5. DOCTRINE OF PUBLIC ACCOUNTABILITY

(a) General

The concept of public accountability is a matter of vital public concern. All the three organs of the government, viz. legislature, executive and judiciary are subject to public accountability.

(b) Doctrine explained

It is settled law that all discretionary powers must be exercised reasonably and in larger public interest. Before more than hundred years, in *Henly v. Lyme Corpn.*,⁷⁶ Best, C.J. stated;

"Now I take it to be perfectly clear, that if a public officer, abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. *The instances of this are so numerous that it would be a waste of time to refer to them.*"

(emphasis supplied)

(c) Illustrative cases

In various cases, the Supreme Court has applied this principle by granting appropriate relief to aggrieved parties or by directing the defaulter to pay damages, compensation or costs to the person who has suffered. Thus, in case of defective construction of houses by statutory authorities, a complaint made by 'consumer' regarding use of substandard material and delay in delivering possession was held maintainable and the instrumentality of State was held liable to pay compensation.⁷⁷ Again, when illegal and unauthorised electric supply resulted in breaking of fire causing death and destruction of property, it was held that the administration was liable to pay compensation.⁷⁸ Very recently, in *Arvind Dat-*

74. Law Commission of India: (First Report), 1956, pp. 31-35.

75. *Corpn. of Calcutta I.* (*supra*): at p. 1365 (AIR).

76. (1858) 5 Bing 91; 130 ER 995.

77. *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243; AIR 1994 SC 787.

78. *Harvinder Chaudhary v. Union of India*, (1996) 8 SCC 80.

tatraya v. State of Maharashtra,⁷⁹ the Supreme Court set aside an order of transfer of a police officer observing that the action was not taken in public interest but was a case of victimisation of an honest officer at the behest of persons interested to target such officials. "It is most unfortunate that the Government demoralises the officers who discharge their duties honestly and diligently and brings to book the persons indulging in black marketing and contrabanding liquor."

(d) Personal liability

A breach of duty gives rise in public law to liability which is known as "misfeasance in public office". Exercise of power by ministers and public officers must be for public good and to achieve welfare of public at large. Wherever there is abuse of power by an individual, he can be held liable. An action cannot be divorced from the actor. A public officer who abuses his official position can be directed to pay compensation, damages or costs.⁸⁰

In *Common Cause; A Registered Society v. Union of India*,⁸¹ the Petroleum Minister made allotment of petrol pumps arbitrarily in favour of his relatives and friends. Quashing the action, the Supreme Court directed the Minister to pay fifty lakh rupees as exemplary damages to public exchequer and fifty thousand rupees towards costs.

In *Shiv Sagar Tiwari v. Union of India*,⁸² allotment of shops/stalls was made by the Housing Minister 'out of quota' to her kith and kin. The Supreme Court not only set aside the allotment but also ordered the Minister to pay sixty lakh rupees to Government Exchequer.

It is submitted that in *Lucknow Development Authority v. M.K. Gupta*,⁸³ after referring to various decisions, the Supreme Court rightly stated:

"When the court directs the payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment

79. (1997) 6 SCC 169.

80. *Henly v. Lyme Corpn.*; *Lucknow Development Authority v. M.K. Gupta*, supra; *Shiv Sagar Tiwari v. Union of India*, infra; *Jaipur Development Authority v. Daulat Mal Jain*, (1997) 1 SCC 35.

81. (1996) 6 SCC 528, 593; AIR 1996 SC 3081, 3538.

82. (1996) 6 SCC 599.

83. (1994) 1 SCC 243(264); AIR 1994 SC 787.

or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries."

But at the same time, personal liability should be imposed on erring officers only after giving notice and affording reasonable opportunity of hearing. Such an action should not be taken lightly and it should not be counter-productive deterring public officers from discharging their duties in accordance with law and in desisting to pursue genuine cases of public welfare having far reaching effect on public administration.⁸⁴

(e) Limitations

The power of judicial review, however, must be exercised cautiously and with circumspection. A court of law should not act as an appellate authority over the actions taken by the government or instrumentalities of State. It cannot interfere with policy decisions. In *G.B. Mahajan v. Jalgaon Municipal Council*,⁸⁵ it was contended that the project undertaken by the local authority was 'unconventional'. Repelling the contention, the Supreme Court stated that the test should not be whether the project was 'unconventional' but whether it was 'impermissible'. There must be a degree of public accountability in all government actions, but the extent and scope of judicial review differ in exercise of such power. The administration cannot be deprived of its power of "right to trial and error" so long as it exercises that power bonafide and within the limits of its authority.⁸⁶

(f) Judicial accountability

The doctrine of public accountability applies to judiciary as well. Every organ of the government is subject to criticism for its flaws and drawbacks and judicial institution is not an exception to it. An essential requirement of justice is that it should be dispensed as quickly as possible. It has been rightly said: "Justice delayed is justice denied." Delay in disposal of cases can, therefore, be commented. Whereas comments and criticisms of judicial functioning, on matters of principle, are

84. *G.B. Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91(94): AIR 1991 SC 1153.

85. (1991) 3 SCC 91(94): AIR 1991 SC 1153.

86. *Sheela Barse v. Union of India*, (1988) 4 SCC 226: AIR 1988 SC 2211.

healthy aids for introspection and improvement, the functioning of the Court in relation to a particular proceeding is not permissible.⁸⁷

(g) Conclusions

All actions of the State and its instrumentalities must be towards the objectives set out in the Constitution. Every step of the government should be in the direction of democratic traditions, social and economic development and public welfare.

The concern of public law is to discipline the public power by forging "legal techniques as part of the way in which public power is made operational and part of the process through which it is attempted to render such public power legitimate and to think of issues of legal regulation of public power in a way that goes deeper than particular instances and elaborate issues of general principle".

The constitutional courts exercise power of judicial review with constraint to ensure that the authorities on whom such power is entrusted under the rule of law exercises it honestly, objectively and for the purpose for which it is intended to be exercised.

It is submitted that while exercising the power of judicial review, the following observations in the nature of warning by an eminent jurist⁸⁸ must always be kept in view:

"This court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

6. DOCTRINE OF ESTOPPEL

(a) Meaning

The doctrine of promissory or equitable estoppel is well settled in administrative law. It represents a principle evolved by equity and avoids injustice. Wade⁸⁹ states: "The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. *Justice here prevails over truth*" (emphasis supplied). Garner⁹⁰ also states: "A person may be precluded ('estopped') in legal proceedings from denying the existence of some state of fact the existence of which he has previously asserted (by words or conduct),

87. *G.B. Mahajan v. Jalgaon Municipal Council*, (supra).

88. Brandies, J. in *New State Ice Comp. v. Ernest*, 285 US 262(311). See also *G.B. Mahajan v. Jalgaon Municipal Council*, (supra).

89. *Administrative Law*, 1994, p. 268.

90. *Administrative Law*, 1985, p. 119.

intending the other party to the proceedings to rely on the assertion, and in reasonable reliance on which that other person has, in fact, acted to his detriment. Though the facts asserted may be untrue, the principle of estoppel may make them unchallengeable."

(b) Nature and scope

Estoppel is often described as a rule of evidence, but more correctly it is a principle of law. Though commonly named as promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. *The basis of this doctrine is equity. It is invoked and applied to aid the law in administration of justice. But for it great many injustices may have been perpetrated.*⁹¹ (emphasis supplied)

(c) Illustration

This principle is embodied in Section 115 of the Indian Evidence Act, 1872. It provides: "When one person by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing". The illustration to the section reads as under:

"A, intentionally and falsely leads B to believe that certain lands belong to A, and thereby induces B to buy and pay for it.

The lands afterwards become the property of A, and A seeks to set aside the sale on the ground that at the time of sale he had no title. He must not be allowed to prove his want of title."⁹²

(d) Traditional view

According to the traditional theory, the doctrine of promissory estoppel cannot itself be the basis of an action. It cannot find a cause of action: it can only be a shield and not a sword.

Similarly, as per the traditional view, the doctrine of equitable estoppel or promissory estoppel applies to private individuals only and the Crown is not bound by it. Thus, in *R. Amphitrite v. R.*⁹³, an undertaking was obtained by a ship-owner from the Government to the effect that on certain conditions being fulfilled, the ship would not be detained.

91. *Indira Bai v. Nand Kishore*, (1990) 4 SCC 668 (670): AIR 1991 SC 1055 (1057); *Canada & Dominion Sugar Co. v. Canadian National Steamships Ltd.*, (1947) AC 46 (56); *Hughes v. Metropolitan Rly. Co.*, (1877) 2 AC 439 (448). *Pawan Alloys v. U.P. State Electricity Board*, (1997) 7 SCC 251 (263-64).

92. See also S. 43 of the Transfer of Property Act, 1882; S. 28 of the Indian Partnership Act, 1932.

93. (1921) 3 KB 500: 126 LT 23: 91 LJKB 75.

Relying on this assurance the ship was sent and contrary to the promise, it was detained by the Government. The owner sued on a petition of right for damages. The court dismissed the action and held that the undertaking was not binding on the Government.

(e) Modern view

It is, however, necessary to make it clear that the doctrine of promissory or equitable estoppel is not really based on the principle of estoppel, but it is a doctrine evolved by equity in order to prevent injustice. The doctrine of promissory estoppel need not, therefore, be inhibited by the same limitation as estoppel in the strict sense of the term. It is equitable principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defence.⁹⁴

Likewise, it has now been accepted and the rule of estoppel applies to the Crown as well. There is no justification for not applying this against the Government and exempt it from liability to carry out its promises given to an individual. The Crown cannot escape from its liability saying that the said doctrine does not bind it. Lord Denning⁹⁵ has rightly observed:

“I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer acting within the scope of his ostensible authority makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be.”

(f) Leading cases

Let us consider some leading decisions.

In *Robertson v. Minister of Pensions*⁹⁶, one R, an army officer claimed a disablement pension on account of war injury. The War Office accepted his disability as attributable to Military service. Relying on this assurance R did not take any steps which otherwise he would have taken to support his claim. The Ministry thereafter refused to grant the pension.

94. *Central London Property Trust Ltd. v. High Trees House Ltd.*, (1947) 1 KB 130; (1946) 1 All ER 256; *Motilal Padampat Sugar Mills v. State of U.P.*, (1979) 2 SCC 409 (426); AIR 1979 SC 621.

95. *Lever (Finance) Ltd. v. Westminster Corpn.*, (1970) 3 All ER 496 (500); (1971) 1 QB 222 (230).

96. (1948) 2 All ER 767 (770); (1949) 1 KB 227 (231).

The court held the Ministry liable. According to Denning, J., the Crown cannot escape by saying that estoppels do not bind the Crown, for *that doctrine has long been exploded.* (emphasis supplied)

So far as Indian law is concerned, it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognised as affording a cause of action to the person to whom the promise is made. The doctrine has also been applied against the Government and the defence based on executive necessity has been categorically negated. Before more than a hundred years, that is, long before the doctrine was formulated by Lord Denning, in *High Trees*⁹⁴ in England, the High Court of Calcutta applied the said doctrine and recognised a cause of action founded upon it in *Ganges Mfg. Co. v. Sourujmull*⁹⁷. The doctrine was also applied against the Government by the High Court of Bombay in the beginning of this century in *Municipal Corpn. of Bombay v. Secy. of State*⁹⁸.

*Union of India v. Anglo Afghan Agencies*⁹⁹ is the classic judicial pronouncement in India on the doctrine of promissory estoppel. In this historic case, 'Export Promotion Scheme' was published by the Textile Commissioner. It was provided in the said scheme that the exporters will be entitled to import raw materials up to 100 per cent of the value of the exports. Relying on this representation, the petitioner exported goods worth rupees 5 lakh. The Textile Commissioner did not grant the import certificate for the full amount of the goods exported. No opportunity of being heard was given to the petitioner before taking the impugned action. The order was challenged by the petitioner. It was contended by the Government that the scheme was merely administrative in character and did not create any enforceable right in favour of the petitioner. It was also argued that there was no formal contract as required by Article 299(1) of the Constitution and, therefore, it was not binding on the Government. Negating the contentions, the Supreme Court held that the Government was bound to carry out the obligations undertaken in the scheme. Even though the scheme was merely executive in nature and even though the promise was not recorded in the form of a formal contract as required by Article 299(1) of the Constitution, still it was open to a party who had acted on a representation made by the Government

97. ILR (1880) 5 Cal 669; 5 CLR 533.

98. ILR (1905) 29 Bom 580; 7 Bom LR 27.

99. AIR 1968 SC 718; (1968) 2 SCR 366.

to claim that the Government was bound to carry out the promise made by it. Speaking for the Court, Shah, J. (as he then was) stated: "We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment."¹

The Court further observed:

"We cannot therefore accept the plea that the Textile Commissioner is the sole judge of the quantum of import licence to be granted to an exporter, and that the courts are powerless to grant relief, if the promised import licence is not given to an exporter who has acted to his prejudice relying upon the representation. *To concede to the Departmental authorities that power would be to strike at the very root of the rule of law.*"² (emphasis supplied)

*Century Spg. and Mfg. Co. v. Ulhasnagar Municipality*³ is another leading case decided by the Supreme Court following its earlier pronouncement in *Anglo-Afghan Agencies*. In this case, the petitioner company set up its factory in the 'Industrial Area'. No octroi duty was payable for the goods imported in that area. The State of Maharashtra published a notification constituting with effect from April 1, 1960, a municipality for certain villages including the 'Industrial Area'. On representation being made by the petitioner company and other manufacturers, the State excluded the Industrial Area from the municipal jurisdiction. But in pursuance of the agreement by the municipality that it will not charge octroi for 7 years, the Industrial Area was retained within the municipal limits. Thereafter, before the expiry of 7 years, the municipality sought to levy octroi duty on the petitioner-company. The company's petition challenging the said levy was dismissed by the High Court of Bombay *in limine*. The company approached the Supreme Court. Allowing the appeal, the Court observed: "Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced *ex-contractu* by a person who acts upon the promise: when the law requires that a contract enforceable at law against public body shall be in certain form or be executed in the manner prescribed

1. AIR 1968 SC 718(723).

2. *Id.* at p. 726 (AIR).

3. (1970) 1 SCC 582; AIR 1971 SC 1021.

by statute, the obligations may be enforced against it in appropriate cases in equity.”⁴

The Court pronounced:

“If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.”⁵

*Motilal Padampat Sugar Mills v. State of U.P.*⁶ is one more leading decision on the subject. In that case, the Government of Uttar Pradesh announced that new industrial units in the State would be granted exemption from payment of sales tax for a period of three years. Acting on the above assurance the petitioner established the factory. Later on, however, the Government withdrew the said benefit. The petitioner approached the High Court but failed. Applying the doctrine of estoppel, the Supreme Court allowed the appeal.

Speaking for the Court, Bhagwati, J. (as he then was) stated:

“It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. *It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel.*”⁷

(emphasis supplied)

Unfortunately, however, a step in the backward direction was taken by the Supreme Court in *Jit Ram v. State of Haryana*⁸. In that case, the Municipal Committee of Bahadurgarh had established a *mandi* at Fateh. It was resolved by the municipality in 1916 that the purchasers of the plot in the *mandi* would not be liable to pay octroi duty on the goods imported within the *mandi*. For about fifty years, the exemption continued. However, in 1965, the municipality decided to levy octroi duty

4. *Id.* at p. 586 (SCC): 1024 (AIR).

5. *Id.* at p. 587 (SCC): 1025 (AIR).

6. (1979) 2 SCC 409: AIR 1979 SC 621.

7. *Id.* at p. 442 (SCC): 643 (AIR).

8. (1981) 1 SCC 11: AIR 1980 SC 1285.

and the said action was challenged *inter alia* on the ground of estoppel. Virtually dissenting with *Motilal Sugar Mills*, the court rejected the contention holding that the doctrine of estoppel could not be invoked.

About *Motilal Sugar Mills*, the court observed: "We feel we are in duty bound to express our reservations regarding the 'activist' jurisprudence and the wide implications thereof which the learned Judge has propounded in his judgment."⁹

It is submitted that apart from the fact that *Jit Ram* does not lay down correct law on the point, even according to the theory of precedent and judicial propriety also, the Court ought not to have taken a different view. *Motilal Sugar Mills* was decided by a Division Bench of two Judges. *Jit Ram* was also placed for hearing before a Bench of two Judges. In these circumstances, even if the Bench in *Jit Ram* was of the opinion that *Motilal Sugar Mills* was not correctly decided, in fairness to the earlier Bench and following the general principle of precedent and judicial propriety, it ought to have referred the matter to the larger Bench.

It is further submitted that even on merits also, *Jit Ram* had really put the clock back and was a step in the reverse direction. In England as well as in America, the traditional view has now been liberalised. So far as India is concerned, one cannot overlook and ignore the written Constitution, Fundamental Rights and the Rule of Law. In this view of the matter, if *Motilal Sugar Mills* was decided on the basis of justice, equity and morality, one cannot say that it was illegal or improper. Again, if the Government has been treated on par with private individuals so far as legal obligations are concerned, it is really a welcome approach and should be encouraged rather than discouraged or condemned.

It is, therefore, submitted that *Jit Ram* does not lay down correct law.

In *Union of India v. Godfrey Phillips India Ltd.*¹⁰, the Central Board of Excise and Customs granted exemption to certain goods from payment of duty. However, subsequently the said benefit was cancelled. The question before the Supreme Court was whether the rule of promissory estoppel was applicable. The Court answered the question in the affirmative.

Regarding *Jit Ram*, Bhagwati, C.J. rightly observed: "We find it difficult to understand how a Bench of two Judges in *Jit Ram case* could possibly overturn or disagree with what was said by another Bench of two Judges in *Motilal Sugar Mills case*. If the Bench of two Judges in *Jit Ram case* found themselves unable to agree with the law laid down

9. (1981) 1 SCC 11(39): AIR 1980 SC 1285(1303).

10. (1985) 4 SCC 369: AIR 1986 SC 806.

Motilal Sugar Mill case, they could have referred *Jit Ram case* to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a coordinate Bench of the same court in *Motilal Sugar Mills*.¹¹

The Court further observed that the law laid down in *Motilal Sugar Mills* was correct and did not approve the observations of *Jit Ram* to the extent that they were contrary to the earlier decision.

Again in *Pawan Alloys v. U.P. State Electricity Board*,¹² certain incentives were granted to new industries by a notification. Subsequently, however, those incentives were prematurely withdrawn. The action was challenged by new industries on the basis of doctrine of promissory estoppel. The High Court dismissed the petitions. The petitioners approached the Supreme Court.

Allowing appeals and setting aside the decision of the High Court, the Supreme Court observed, "These new industries which got attracted to this region relying upon the promise had altered their position irretrievably. On these well-established facts the Board can certainly be pinned down to its promise on the doctrine of promissory estoppel."¹³

(g) Estoppel against statute

It should not, however, be forgotten that there cannot be any estoppel against a statute. The doctrine cannot be allowed to operate so as to validate an *ultra vires* act or to override the clear words of a statute nor does it apply to criminal proceedings.¹⁴ The doctrine cannot be used against or in favour of the administration so as to give *de facto* validity to *ultra vires* administrative acts.¹⁵

Thus, in *Howell v. Falmouth Boat Construction Co.*¹⁶, the relevant statute required a licence to do ship repair work. An assurance was given by the designated official that no such licence was necessary. The plaintiff sued for payment of work done by him. It was argued that the work was illegal as no written licence was obtained by him. The Court of

11. *Id.* at p. 387 (SCC): 815 (AIR); see also *Gujarat State Financial Corpn. v. Lotus Hotels*, (1983) 3 SCC 379: AIR 1983 SC 848.

12. (1997) 7 SCC 251.

13. *Id.* at pp. 271-72.

14. Wade: *Administrative Law*, 1994, pp. 269-71; Garner: *Administrative Law*, 1985, p. 119; Schwartz: *Administrative Law*, 1985, p. 135; *Minister of Agriculture v. Mathews*, (1950) 1 KB 148; (1949) 2 All ER 724.

15. *Ibid.*, see also *Wells v. Minister of Housing*, (1967) 1 WLR 1000(1007); *Western Fish Products v. Penwith*, (1978) 38 P & CR 7; *Shrijee Sales Corpn. v. Union of India*, (1997) 3 SCC 398; *Pawan Alloys v. U.P.S.E.B.*, (1997) 7 SCC 251(263-64).

16. (1951) 2 All ER 278: (1951) AC 837.

Appeal decided in favour of the plaintiff on the basis of the doctrine of estoppel. Reversing the judgment of Lord Denning and dismissing the claim of the plaintiff, the House of Lords pronounced:

“It is certain that neither a Minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or from prosecuting for its breach.”¹⁷

In *Amar Singhji v. State of Rajasthan*¹⁸, the Secretary to the Government wrote a letter to the Collector of Tonk that the Jagir of Raj Mata would not be acquired during her life time. Subsequently, resumption proceedings were initiated against the petitioner. It was contended by the petitioner that the Government was estopped from initiating resumption proceedings. Negating the contention, the Supreme Court held that the powers of resumption were regulated by the statute and must be exercised in accordance with law. “The Act confers no authority on the Government to grant exemption from resumption, and an undertaking not to resume will be invalid, and *there can be no estoppel against a statute.*” (emphasis supplied)

Similarly in *Mulamchand v. State of M.P.*¹⁹, it was held that if the provisions of Section 175(3) of the Government of India Act, 1935 are not complied with, the contract is void. No question of estoppel therefore arises. If the plea of estoppel is upheld, it would mean in effect the repeal of an important constitutional provision.

Again, in *Excise Commr. v. Ram Kumar*²⁰, the Supreme Court held that the sale of country liquor which had been exempted from sales tax at the time of auction of licences could not operate as an estoppel against the Government. The Supreme Court observed:

“It is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers.”²¹

(h) Estoppel and public policy

The doctrine of estoppel is equitable and, therefore, it must yield to equity and can be invoked in the larger public interest. If a promise or agreement is opposed to public policy, it cannot be enforced. Likewise,

17. (1951) 2 All ER 278(285): (1951) AC 837(849).

18. AIR 1955 SC 504 (534).

19. AIR 1968 SC 1218.

20. (1976) 3 SCC 540: AIR 1976 SC 2237.

21. *Id.* at p. 545 (SCC): 2241 (AIR). For other cases, see C.K. Thakker: *Administrative Law*, 1996, pp. 1354.

it cannot be extended or applied where the promise has been obtained by playing fraud on the Constitution. For instance, a right to reservation under Article 15 or 16 of the Constitution has been made with a view to promote interests of certain backward classes. If a person who does not belong to that class obtains false certificate and gets an employment, and on coming to know about the true facts, has been removed from service, he cannot invoke this doctrine. It would be permitting to play fraud on the Constitution.²²

(i) Estoppel and public interest

The doctrine of promissory estoppel is equitable and it cannot be invoked against public interest. It does not apply if the result sought to be achieved are against public good. The doctrine must yield to equity.

In *Kasinka Trading Co. v. Union of India*,²³ a notification was issued under the Customs Act, 1962 granting exemption from payment of custom duty on certain raw materials imported from foreign country. The notification was issued in public interest and it was to remain in force for two years. Subsequently, however, the exemption was withdrawn before the expiry of the period again in public interest. The Supreme Court upheld the action.

Reiterating the principle laid down in *Kasinka Trading Co.*, in *Shrijee Sales Corpn. v. Union of India*,²⁴ the Supreme Court stated: "Once public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases where a period has been indicated."

(j) Conclusions

It is submitted that the following observations of Bhagwati, J. (as he then was) in *Motilal Padampat Sugar Mills v. State of U.P.*²⁵ lay down correct law on the point. His Lordship propounded:

"Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, com-

22. *Amrit Banaspati Co. v. State of Punjab*, (1992) 2 SCC 411; AIR 1992 SC 1075; *Vasant Kumar v. Board of Trustees*, (1991) 1 SCC 761; AIR 1991 SC 14; *Shrijee Sales Corpn. v. Union of India*, (1997) 3 SCC 398; *Pawan Alloys v. U.P. State Electricity Board*, (1997) 7 SCC 251.

23. (1995) 1 SCC 274; AIR 1995 SC 874.

24. (1997) 3 SCC 398(405).

25. (1979) 2 SCC 409; AIR 1979 SC 621.

mitted to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of 'honesty and good faith'? *The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the courts and the legislature must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction.*²⁶

(emphasis supplied)

7. CROWN PRIVILEGE

(a) General

In every democratic society, it is of utmost importance that the citizens get sufficient information and knowledge about the functioning of the Government. Democracy cannot survive without accountability to public. The basic postulate of accountability is openness of the Government. The very integrity of judicial system and public confidence depend on full disclosure of facts.²⁷

(b) England

In England, the Crown has the special privilege of withholding disclosure of documents, referred to as 'Crown Privilege'. It can refuse to disclose a document or to answer any question if in its opinion such disclosure or answer would be injurious to the public interest. This doctrine is based on the well-known maxim *solus populi est suprema lex* (public welfare is the highest law). The public interest requires that justice should be done, but it may also require that the necessary evidence should be suppressed. This right can be exercised by the Crown even in those proceedings in which it is not a party.²⁸

*Duncan v. Cammell, Laird & Co. Ltd.*²⁹, is the leading case on the point. At the time of the Second World War, the submarine *Thetis* sank during her trials and 99 lives were lost. In an action for negligence, the widow of one of the dead persons sought discovery of certain documents in order to establish liability against the government contractors. The Admiralty claimed 'Crown Privilege' which was upheld by the House

26. (1979) 2 SCC 409(442-43): AIR 1979 SC 621(643-44).

27. *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 (273): AIR 1982 SC 149.

28. Wade: *Administrative Law*, 1994, pp. 845-46; Garner: *Administrative Law*, 1985, pp. 213-14; de Smith: *Judicial Review of Administrative Action*, 1995, pp. 70-92.

29. (1942) AC 624: (1942) 1 All ER 587.

of Lords. It observed that the affidavit filed by the Minister that disclosure would be against the 'public interest' could not be called into question. Lord Simon observed:

"The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld."³⁰

But this decision was very much criticised. It was regarded as a 'very formidable impediment to justice and fair play' by Sir C.K. Allen and by Goodhart as 'opposed to the whole course of British Constitutional history'.³¹ In fact, that was not the law previously. As Wade³² states:

"The power thus given to the Crown was dangerous since, unlike other governmental powers, it was exempt from judicial control. The law must of course protect genuine secrets of State. But 'Crown Privilege' was also used for suppressing whole classes of relatively innocuous documents, thereby sometimes depriving litigants of the ability to enforce their legal rights. This was, in effect, expropriation without compensation. It revealed the truth of the United States Supreme Court's statement on the same problem that 'a complete abandonment of judicial control would lead to intolerable abuses'.³³ 'Privilege was claimed for all kinds of official documents on purely general grounds, despite the injustice to litigants. It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw'.³⁴

de Smith³⁵ rightly states: "No one seriously suggested that the decision in relation to the particular facts of the case was unsatisfactory; the documents which the Admiralty had sought to withhold from production included blueprints of a new type of submarine, and the proceedings had been instituted in wartime. Critics fastened on to the broader proposition enunciated by the House of Lords, that a Minister, by virtue of his *ipse dixit*, could make an unreviewable pronouncement excluding relevant evidence merely because, in his opinion, it fell within a class of document which it would be contrary to the public interest to disclose in court. Provided that a Minister performed a suitably elaborate ritual

30. *Id.* at p. 636 (AC): 592 (All ER).

31. Even with regard to cabinet documents, Lord Fraser observed:

"I do not think that even Cabinet minutes are completely immune from disclosure in a case where, for example, the issue in a litigation involves serious misconduct by a Cabinet minister." Wade: *Administrative Law*, 1994, p. 853.

32. *Administrative Law*, 1994, pp. 845-46.

33. *U.S. v. Reynolds*, (1953) 345 US 1: 97 Law Ed 727.

34. Wade: *Administrative Law*, 1994, pp. 847-48.

35. de Smith: *Judicial Review of Administrative Action*, 1995, pp. 72-73.

beforehand, he would be allowed in substance to do as he thought fit. *The interests of litigants, and the public interest in securing the due and manifestly impartial administration of justice, had thus been subordinated to executive discretion*, subject only to extra-legal checks; and all this in a case where a general abdication by the courts had been unnecessary for the decision". (emphasis supplied)

In *Ellis v. Home Office*³⁶, Ellis, an undertrial prisoner was violently assaulted by another prisoner, who was under observation with a suspected mental defect. Ellis alleged negligence on the part of the Prison Authorities, but the Crown claimed privilege in respect of the medical reports and consequently, Ellis lost his action.

It is submitted that the evidence could have been made available without any injury to the public interest. Delvin, J. rightly observed:

"[B]efore I leave this case I must express, as I have expressed during the hearing of the case, my uneasy feeling that justice may not have been done because the material evidence before me was not complete, and something more than an uneasy feeling that, *whether justice has been done or not, it certainly will not appear to have been done.*"³⁷ (emphasis supplied)

In *Conway v. Rimmer*³⁸, the House of Lords reviewed the earlier legal position and laid down 'more acceptable law'. A police constable was prosecuted for theft of an electric torch and was acquitted. He sued the prosecutor for malicious prosecution and applied for discovery of certain documents relevant for that purpose. 'Crown Privilege' was claimed. The House of Lords took advantage of their newly discovered power to depart from the doctrine of *stare decisis*³⁹, overruled *Duncan*²⁹ and disallowed the claim for privilege. It held that a statement by a Minister cannot be accepted as conclusive preventing a court from ordering production of any document. It is proper for the court 'to hold the balance between the public interest, as expressed by a Minister to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice'. Certain types of documents ought not to be disclosed, e.g. cabinet minutes, documents relating to national defence, foreign affairs, etc. On the other hand, privilege should not be claimed or allowed for routine or trivial documents. To decide

36. (1953) 2 QB 135; (1953) 2 All ER 149.

37. *Id.* at p. 137 (QB); 155 (All ER).

38. (1968) 1 All ER 874; (1968) AC 910; (1968) 2 WLR 998.

39. See announcement of Lord Chancellor Gardiner on July 26, 1966: 110 *Solicitor's Journal* 584.

whether the document in question ought to be produced or not, the judge must inspect the document without it being shown to the parties. Accordingly, in this case, the document was ordered to be produced as the disclosure was not prejudicial to the public interest. As Wade⁴⁰ graphically puts it, "the House of Lords has contributed to Human Rights Year, by bringing back into legal custody, a dangerous executive power".

He also states: "This was the culmination of a classic story of undue indulgence by the courts to executive discretion, followed by executive abuse, leading ultimately to a radical reform achieved by the courts themselves."⁴¹

(c) India

(i) *Statutory provisions*

In India the basic principle is incorporated in Section 123 of the Evidence Act, 1872, which reads as under:

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."⁴²

Section 162 of the Act confers on a court the power to decide finally the validity of the objection raised against production of document.

As a general rule, the principle is that both the parties to the dispute must produce all the relevant and material evidence in their possession. The Evidence Act has prescribed elaborate rules to determine relevance and has accepted the doctrine of onus of proof. And if any party fails to produce such evidence, an adverse inference can be drawn under Section 114 of the said Act. Section 123 confers a great advantage on the Government inasmuch as in spite of non-production of relevant evidence before the court, no adverse inference can be drawn against it if the claim of privilege is upheld by the court. Thus, it undoubtedly constitutes 'a very serious departure' from the ordinary rules of evidence. The principle on which this departure can be justified is the principle of the 'overriding and paramount character of public interest'. The claim proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public interest and private interest, the latter must yield

40. Wade: *Administrative Law*, (1994), p. 851.

41. *Id.* at p. 833, see also *Air Canada v. Secy. of State*, (1983) 1 All ER 910: (1983) 2 WLR 494.

42. See also Ss. 124, 162; Articles 22(6), 74(2) and 163(3), Constitution of India.

to the former. No doubt the litigant whose claim may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and, the court, in reaching the said decision, may feel dissatisfied, but that will not affect the validity of the basic principle that public good and public interest must override considerations of private good and private interest.

(ii) *Leading cases*

Let us consider some important decisions on the point:

*State of Punjab v. Sodhi Sukhdev Singh*⁴³ is the leading case on the subject. One S, a District and Sessions Judge was removed from service by the President of India. In pursuance of the representation made by him, he was re-employed. Thereafter, he filed a suit for declaration that the order of removal was illegal, void and inoperative. He also claimed arrears of salary. He filed an application for production of certain documents. The State claimed privilege. The Supreme Court by majority held that the documents in question were protected under Section 123 of the Evidence Act and could be withheld from production on the ground of public interest.

The Court conceded that it could not hold an inquiry into the possible injury to public interest which may result from the disclosure of the document in question. "That is a matter for the authority concerned to decide; but the court is competent, *and indeed is bound*, to hold a preliminary enquiry and determine the validity of the objections of its production." (emphasis supplied)

"It is true that the scope of enquiry in such a case is bound to be narrow and restricted; but the existence of the power in the Court to hold such an enquiry will itself act as a salutary check on the capricious exercise of power conferred under Section 123...."⁴⁴

In *Amar Chand v. Union of India*⁴⁵, the Supreme Court reiterated the principle laid down in *Sodhi Sukhdev Singh*. There, A had filed a suit against the Government for recovery of certain amounts. During the course of the trial, A called upon the defendants to produce certain documents. The defendants claimed privilege. Following *Sodhi Sukhdev Singh*, the Supreme Court rejected the claim of the defendants.

In *State of U.P. v. Raj Narain*⁴⁶, Raj Narain had filed an election petition against the then Prime Minister, Smt. Indira Nehru Gandhi. Dur-

43. AIR 1961 SC 493: (1961) 2 SCR 371.

44. *Id.* at p. 505 (AIR).

45. AIR 1964 SC 1658.

46. (1975) 4 SCC 428: AIR 1975 SC 865.

ing the trial, he applied for production of certain documents. The Government claimed privilege in respect of those documents. The High Court of Allahabad rejected the claim. The Supreme Court allowed the appeal and set aside the order passed by the High Court.

Speaking for the majority, Ray, C.J. observed: "Public interest which demands that evidence be withheld is to be weighed against the private interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. *The court will proprio motu exclude evidence the production of which is contrary to public interest.*"⁴⁷ (emphasis supplied)

In concurring judgment, upholding the "right to know", Mathew, J. observed: "The Court, therefore, has to consider two things; whether the document relates to the secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in Section 123 'as he thinks fit' confer an absolute discretion on the head of the department to give or withhold such permission.... An overriding power in express terms is conferred on the court under Section 162 to decide finally on the validity of the objection. The Court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. It is, therefore, clear that even though the head of the department has refused to grant permission, it is open to the court to go into the question after examining the document and find out whether the disclosure of the document would be injurious to public interest and the expression 'as he thinks fit' in the latter part of Section 123 need not deter the Court from deciding the question afresh as Section 162 authorises the Court to determine the validity of the objection finally."⁴⁸

In *State of U.P. v. Chandra Mohan Nigam*⁴⁹, the Supreme Court held that when an order of compulsory retirement was challenged as arbitrary or *mala fide* by making clear and specific allegations, it was certainly necessary for the Government to produce all the necessary materials to rebut such pleas to satisfy the Court by voluntarily producing such documents as will be a complete answer to the plea. "*Ordinarily, the ser-*

47. *Id.* at pp. 442-43, para 41 (SCC): p. 875 (AIR).

48. *Id.* at pp. 451-52 (SCC): 882-83 (AIR).

49. (1977) 4 SCC 345 (358): AIR 1977 SC 2411 (2421).

vice record of a Government servant in a proceeding of this nature cannot be said to be a privileged document which should be shut out from inspection." (emphasis supplied)

Again, a similar question arose in the well-known case of *S.P. Gupta v. Union of India*⁵⁰, popularly known as '*the Judges*' transfer case. A privilege was claimed by the Government against disclosure and production of certain documents. After considering a number of English as well as American cases, the Court held that the provisions of the Evidence Act, 1872 should be construed keeping in view our new democracy wedded to the basic values enshrined in the Constitution. In a democracy, citizens ought to know what their Government is doing. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. Therefore, *disclosure of information in regard to functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.*⁵¹ (emphasis supplied)

The final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with the court by reason of Section 162. (emphasis supplied) The court is not bound by the assertions made by a Minister or a Head of the department in an affidavit in support of plea against non-disclosure. The court retains the power to balance the injury to the State or the public service against the risk of injustice, before reaching the decision. Bhagwati, J. (as he then was) further observed: "Every claim for immunity in respect of a document, whatever be the ground on which the immunity is claimed, and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one test, namely, what does public interest require — disclosure or non-disclosure.... And this exercise has to be performed in the context of the democratic ideal of an open Government."⁵²

In *R.K. Jain v. Union of India*⁵³, an appointment of the President of CEGAT (Customs, Excise and Gold Control Appellate Tribunal) was challenged in the Supreme Court. Necessary record was ordered to be produced by the court. The Attorney General claimed privilege. Negating the plea and considering various Indian and foreign decisions, the

50. 1981 Supp SCC 87; AIR 1982 SC 149.

51. *Id.* at para 67 (SCC).

52. *Id.* at paras 69, 80 (SCC).

53. (1993) 4 SCC 119.

Court observed that except the actual advice tendered to the President by the Cabinet, the rest of the file and records were open to *in camera* inspection by the Court.

(iii) Right to know

The modern trend is towards more open government. The right to know is part and parcel of freedom of speech and expression and is thus a fundamental right guaranteed under Article 19 of the Constitution. It is also equally paramount consideration that justice should not only be done but also be publicly recognised as having been done.⁵⁴

In *Reliance Petrochemicals Ltd. v. Indian Express Newspapers*,⁵⁵ Mukharji, J. (as he then was) stated: "We must remember that the people at large have a right to know in order to be able to take part in participatory development in the industrial life and democracy. *Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age of our land under Article 21 of the Constitution.* That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves responsibility to inform." (emphasis supplied)

In the leading case of *State of U.P. v. Raj Narain*,⁵⁶ the Supreme Court rightly observed, "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions, which can at any rate, have no repercussion on public security. *To cover with veil of secrecy, the common routine business, is not in the interest of the public.*" (emphasis supplied).

54. *R.K. Jain v. Union of India*, (1993) 4 SCC 119 (163-64).

55. (1988) 4 SCC 592 (613): AIR 1989 SC 190 (202-03), see also observations of Krishna Iyer, J. in *Maneka Gandhi v. Union of India*: "A government which revels in secrecy in the field of people's liberty not only acts against democratic decency but busies itself with its own burial... *Public power must rarely hide its heart in an open society and system*". (1978) 1 SCC 248 (342): AIR 1978 SC 597 (661).

56. (1975) 4 SCC 428(453): AIR 1975 SC 865: (1975) 3 SCR 333, see also *Star Enterprises v. City & Industrial Development Corpn.*, (1990) 3 SCC 280.

(iv) Power and duty of courts

It is well-settled that a court is not bound by the statement made by the Minister or the head of the department in the affidavit claiming privilege. The court has to balance injury to the State or public against risk of injustice to the cause. In balancing competing interests it is the duty of the court to see that no harm should be done to the nation by the disclosure of the document and that justice should not suffer by permitting withholding of the document. The court must decide which aspect of the public interest predominates; whether the public interest which requires that the document should not be produced outweighs the public interest which requires the document to be produced. In striking the balance, the court may itself inspect the document. It is constitutional, legitimate and lawful *power and duty* of the court to ensure that powers, constitutional, statutory or executive are exercised by the Government in accordance with the Constitution and the law.⁵⁷

At the same time, courts should not allow production of documents if they are of a "fishing" nature. The court should not take a peep just on the off chance of finding something useful. It should inspect documents only where it has definite grounds for expecting to find material of real importance to the party seeking disclosure.

(v) Considerations

Whenever an objection is raised against disclosure of a document on the ground that it belongs to a class which in the larger public interest ought not to be disclosed, it would be difficult to decide the question in vacuum. The court must consider various factors such as, interest likely to be affected by disclosure; extent to which such interests would be affected; seriousness of the issues raised in relation to which production is sought; effect of disclosure of document on the outcome of the case; likelihood of injustice if disclosure is not allowed, etc. *Each case must be considered and decided on its own facts and circumstances.*⁵⁸

(emphasis supplied)

(vi) Test

There is natural temptation on the part of the executive to regard the interest of the department as paramount forgetting the larger and greater interest, i.e. interest of justice. Many a time, it may not be convenient for the executive to produce a particular document and it may adopt an easy course of claiming privilege. As has been rightly said; "Inconveni

57. *R.K. Jain v. Union of India* (supra); at p. 139 (SCC).

58. *Id.* at pp. 162-64 (SCC).

ence and justice are often not on speaking terms." The court must be alive of such possibility and decide the question keeping in mind the well-known maxim *populi est supreme lex* (public welfare is the highest law)⁵⁹.

(d) Conclusions

It is submitted that the following observations of Gajendragadkar, J. (as he then was) in the leading case of *State of Punjab v. Sodhi Sukhdev Singh*⁶⁰ lay down correct law on the point. After considering the relevant provisions and leading decisions on the point, His Lordship propounded:

"It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department, or even the Government in power, has no relevance in making a claim for privilege under Section 123. The apprehension that the disclosure may adversely affect the head of the department or the Minister or even the Government, or that it may provoke public criticism or censure in the legislature has also no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. *The sole and the only test which should determine the decision of the head of the department is injury to public interest and nothing else.*"⁶¹ (emphasis supplied)

8. MISCELLANEOUS PRIVILEGES OF GOVERNMENT

Over and above the aforesaid privileges, the Government enjoys many other privileges also. Some of them are as under⁶²:

- (1) Under Section 80 of the Code of Civil Procedure, 1908, no suit can be instituted against the Government until the expiration of two months after a notice in writing has been given.
- (2) Rule 5-B of Order 27 of the said Code casts duty on the court in suits against Government to assist in arriving at a settlement.
- (3) Rule 8-A of Order 27 of the said Code provides that no security shall be required from the Government.
- (4) Under Section 82 of the said Code, when a decree is passed against the Union of India or a State, it shall not be executed unless it remains unsatisfied for a period of three months from the date of such decree.

59. *Id.*; at pp. 139, 162 (SCC).

60. AIR 1961 SC 493; (1961) 2 SCR 371.

61. *Id.*; at p. 504 (AIR).

62. For detailed discussion; see C.K. Takwani: *Civil Procedure*, 1997, pp. 243-48.

- (5) Under Article 112 of the Limitation Act, 1963, any suit by or on behalf of the Central Government or any State Government can be instituted within the period of 30 years.
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Lecture XI

Public Corporations

Uncle Sam has not yet awakened from his dream of Government of bureaucracy, but ever wanders further afield in crazy experiments in State socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conceptions of Government, as wisely defined in the Constitution of the United States.

—JAMES M. BECK

Today, probably the giant corporations, the labour unions, trade associations and other powerful organisations have taken the substance of sovereignty from the State. We are witnessing another dialectic process in history, namely, that the sovereign State having taken over all effective legal and political power from groups surrenders its powers to the new massive social groups.

—FRIEDMANN

SYNOPSIS

1. Introduction
2. Definition
3. Characteristics
4. Classification
 - (i) Commercial corporations
 - (ii) Development corporations
 - (iii) Social services corporations
 - (iv) Financial corporations
5. Working of Public Corporations
 - (i) Reserve Bank of India
 - (ii) Oil and Natural Gas Commission
 - (iii) Damodar Valley Corporation
 - (iv) Life Insurance Corporation of India
 - (v) Road Transport Corporations
 - (vi) State Trading Corporation
6. Rights and duties of Public Corporations
 - (a) Status
 - (b) Rights
 - (c) Powers
 - (d) Duties
 - (e) Lifting of veil
7. Liabilities of Public Corporations
 - (a) Liability in contracts
 - (b) Liability in torts
 - (c) Liability for crimes

- (d) Crown privilege
- 8. Servants of Public Corporations
 - (a) General
 - (b) Whether civil servants?
 - (c) Whether public servants?
 - (d) Whether entitled to reinstatement?
 - (e) Principles
- 9. Controls over Public Corporations
 - (a) Judicial control
 - (i) General
 - (ii) Traditional view
 - (iii) Modern view
 - (iv) Illustrative cases
 - (v) Power and duties of courts
 - (vi) Conclusions
 - (b) Governmental control
 - (i) General
 - (ii) Appointment and removal of members
 - (iii) Finance
 - (iv) Directives
 - (v) Rules and Regulations
 - (vi) Suggestions
 - (c) Parliamentary control
 - (i) General
 - (ii) Statutory provisions
 - (iii) Questions
 - (iv) Debates
 - (v) Parliamentary Committees
 - (vi) Conclusions
 - (d) Control by public
 - (i) General
 - (ii) Consumer councils
 - (iii) Membership
 - (iv) Consumers and courts
 - (v) Consumer Protection Act
- 10. Conclusions

1. INTRODUCTION

As stated in the previous lectures, the passive policy of '*laissez faire*' has been given up by the State. Today it has not confined its scope to the traditional, minimum functions of defence and administration of justice. The old 'police State' has now become a 'welfare State'. It seeks to ensure social security and social welfare for the common mass. It also participates in trade, commerce and business. With a view to achieving

the object of 'socialist',¹ democratic republic, constitutional protection is afforded to State monopoly² and necessary provisions are incorporated in the Constitution itself by laying down the 'Directive Principles of State Policy'. It is also provided that "notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy"³. The political philosophy of the 20th century has, therefore, impelled the Government to enter into trade and commerce with a view to making such enterprises pursue public interest and making them answerable to the society at large.

Once, the Government entered the field of trade and commerce, it became increasingly evident that the governmental machinery hitherto employed merely for the maintenance of law and order was wholly inadequate and unsuitable for business exigencies, which demanded a flexible approach. It was, therefore, felt necessary to evolve a device which combined the advantages of flexibility with public accountability. It was in response to this need that the institution of public corporation grew.⁴

2. DEFINITION

No statute or court has ever attempted or been asked to define the expression 'public corporation'. It has no regular form and no specialised function. It is employed wherever it is convenient to confer corporate personality.

In *Dhanoa v. Municipal Corpn., Delhi*⁵, a corporation is defined thus:

"A corporation is an artificial being created by law having legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession, notwithstanding changes in its membership. In addition, it possesses

1. Preamble to the Constitution of India, as amended by the Constitution (42nd Amendment) Act, 1976.
2. Article 19(6)(ii), Constitution of India.
3. Article 31-C, Constitution of India.
4. For the reasons of growth and development of public corporations, see *R.D. Shetty v. International Airport Authority*, (1979) 3 SCC 489 (506-07): AIR 1979 SC 1628.
5. (1981) 3 SCC 430 (437): AIR 1981 SC 1395 (1398); see also *Sukhdev Singh v. Bhagatram*, (1975) 1 SCC 421: AIR 1975 SC 1331.

the capacity as such legal entity of taking, holding and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of its creation just as a natural person may.”

3. CHARACTERISTICS

Since a public corporation is a ‘hybrid organism, showing some of the features of a Government department while some of the features of a business company, it is not possible to precisely enumerate the characteristics of such corporation. However, it can be said that a corporation created *by* or *under* a statute possesses the following main characteristics⁶:

- (1) A corporation is established by or under a statute. It possesses an independent corporate personality and it is an entity different from the Union or the State Government. It is a body corporate with perpetual succession and a common seal. It can sue and be sued in its own name.
- (2) There may be several members or shareholders of a corporation. The law, however, knows only one body corporate. Juristic personality of corporation is distinct from its individual members.
- (3) A corporation having neither soul nor body, it acts through natural persons.
- (4) A corporation exercises its rights, performs its functions and discharges its duties and obligations entrusted to it by its constituent statute or charter by which it is created. Its powers do not extend beyond what the statute provides expressly or by necessary implication.
- (5) Every action of a corporation not expressly or impliedly authorised by the statute or charter is *ultra vires* and having no legal effect whatsoever.
- (6) The doctrine of *ultra vires*, however, must be interpreted and applied reasonably. All incidental and consequential actions should be held legal and lawful.
- (7) A corporation can possess, hold and dispose of property.
- (8) Subject to the provisions of the statute by or under which a corporation is created, such corporation is by and large an autonomous body. Even though the ownership, control and management of a corporation might be vested in the Union or the State, in

6. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 542-43.

the eye of law, the corporation is its own master in day-to-day management and administration.

- (9) An appropriate Government may issue directives relating to policy matters. The corporations are bound by them and have to act in accordance with such directions.
- (10) The constituent statute or charter may delegate the rule-making power to a corporation. Such rules, regulations and bye-laws are enforceable and binding unless they are *ultra vires* the parent Act, Constitution of India or are otherwise bad in law.
- (11) A corporation created by or under a statute can be said to be an agency or instrumentality of the Government and 'State' within the meaning of Article 12 of the Constitution, and therefore, is subject to the jurisdiction of the Supreme Court under Article 32 and of the High Courts under Article 226 of the Constitution.
- (12) Employees of a corporation do not hold 'civil post' under the Union or the State within the meaning of Part XIV of the Constitution of India.
- (13) A corporation cannot be said to be a 'citizen' within the meaning of Part II of the Constitution and therefore, it cannot claim benefits of those Fundamental Rights which have been conferred only on the citizens.
- (14) A corporation is liable for breach of contract and also in tort.
- (15) Since a corporation is neither a department nor an organ of the Government, the doctrine of 'Crown Privilege' cannot be claimed by it.

4. CLASSIFICATION

A logical classification of public corporations is not possible, and neither Parliament nor the courts have made any serious attempt in that direction. But jurists have tried to categorise public corporations. Prof. Griffith and Street⁷ divide public corporations into two groups: (i) Managerial economic bodies; and (ii) Managerial social bodies. Prof. Hood Phillips⁸ divides them into four classes: (i) Managerial-industrial or commercial corporations; (ii) Managerial-social services corporations; (iii) Regulatory corporations; and (iv) Advisory corporations. According to Prof. Garner⁹, they can be divided into three groups: (i) Commercial corporations; (ii) Managerial corporations; and (iii) Regulatory corporations.

7. *Principles of Administrative Law*, 1967, pp. 281-84.

8. *Constitutional and Administrative Law*, 1967, pp. 556-57.

9. *Administrative Law*, 1989, pp. 347-54.

In India, public corporations may be classified into four 'ill-assorted' main groups:

- (i) Commercial corporations;
- (ii) Development corporations;
- (iii) Social services corporations; and
- (iv) Financial corporations.

(i) Commercial corporations

This group includes those corporations which perform commercial and industrial functions. The managing body of a commercial corporation resembles the Board of Directors of a public company. As their functions are commercial in nature, they are supposed to be financially self-supporting and they are also expected to earn profit. At the same time they are required to conduct their affairs in the interests of the public and do not operate merely with a profit-earning motive unlike a private industry. State Trading Corporation, Hindustan Machine Tools, Indian Airlines Corporation and Air India International are some of the commercial corporations.

(ii) Development corporations

The modern State is a 'Welfare State'. As a progressive State, it exercises many non-sovereign functions also. Development corporations have been established with a view to encourage national progress by promoting developmental activities. As they are not commercial undertakings, they may not be financially sound at the initial stage and may require financial assistance from the Government. Oil and Natural Gas Commission, Food Corporation of India, National Small Industries Corporation, Damodar Valley Corporation, River Boards, Warehousing Corporations, are development corporations.

(iii) Social services corporations

Corporations which have been established for the purpose of providing social services to the citizens on behalf of the Government are not commercial in nature and therefore, are not expected to be financially self-supporting. In fact, as their object is to render social service, they are not required to conduct their affairs for the purpose of earning profits. Generally, they depend on the Government for financial assistance. Hospital Boards, Employees' State Insurance Corporation, Housing Board, Rehabilitation Housing Corporation are examples of social services corporations.

(iv) Financial corporations

This group includes financial institutions, like Reserve Bank of India, State Bank of India, Industrial Finance Corporation of India, Life Insurance Corporation of India and Film Financing Corporation. They advance loans to institutions carrying on trade, business or industry on such terms and conditions as may be agreed upon. They may provide credit to those institutions which find it difficult to avail of the same or which do not find it possible to have recourse to capital issue methods (e.g. Industrial Finance Corporation). They may give financial assistance on reasonable terms to displaced persons in order to enable them to settle in trade, business or industry (e.g. Rehabilitation Finance Corporation).

5. WORKING OF PUBLIC CORPORATIONS

The constitution of the corporations and their functions, powers and duties¹⁰ may be understood by a study of the actual working of a few public corporations.

(i) Reserve Bank of India (RBI)

The Reserve Bank of India was constituted under the Reserve Bank of India Act, 1934. It was nationalised in 1948 by the Reserve Bank (Transfer to Public Ownership) Act, 1948. It is a body corporate having perpetual succession and a common seal. It can sue and be sued. It was primarily established to regulate the credit structure, to carry on banking business and to secure monetary stability in the country. It is managed by a Board of Directors, consisting of a Governor, two Deputy Governors and a number of directors. The Governor and the Deputy Governors are whole-time employees and receive such salaries and allowances, as may be fixed by the Board with the approval of the Central Government. They are appointed by the Central Government for a term of five years and are eligible for re-employment.

Under the Banking Companies Act, 1949, the Reserve Bank has extensive powers over the banking business in India. It grants licences without which no company can carry on banking business. Before granting such licence, it can inquire into the affairs of the company to satisfy itself as regards the company's capacity to pay back to its depositors. It can cancel a licence on the ground that the conditions specified therein have not been complied with. Even after granting such a licence it may inquire into the affairs of any bank, inspect its books of accounts and hold an investigation either under the direction of the Central Govern-

10. See also R.S. Arora: *State Liability and Public Corporations in India*, (1966) Public Law 245.

ment or *suo motu*. The report of the inquiry will have to be sent to the Central Government. A copy of such report will also be given to the banking company concerned. It can make a representation to the Central Government on any point arising out of the report. Upon this report, the Central Government may order the suspension of the banking business by the company concerned or direct it to apply for its liquidation.

Very wide discretionary powers have been conferred on the Reserve Bank. It determines the policy relating to bank advances, frames proposals for amalgamation of two or more banks. It may make a representation for the operation of the Banking Companies Act to be suspended. The Governor of the Bank is empowered to suspend the operation of the Act for 30 days in an emergency. The validity of these wide discretionary powers has been upheld by the courts.¹¹

(ii) Oil and Natural Gas Commission (ONGC)

The Commission was first established in the year 1956 as a Government department. By the Oil and Natural Gas Commission Act, 1959, the Commission was given a status of a public corporation. It is a body corporate enjoying perpetual succession and a common seal. It can sue and be sued. It can hold and dispose of property and can enter into contracts for any of the objects of the Commission. The Commission consists of a Chairman and two or more (not exceeding eight) members, to be duly appointed by the Central Government. Except a Finance Member, others may be part-time or full-time members. The Central Government prescribes the rules fixing their terms of office and conditions of service. It can remove any member even before the expiry of the period, after issuing a show-cause notice and a reasonable opportunity of being heard. The Commission has its own funds and all receipts and expenditures are to be made to and from such funds. It also maintains an account with the Reserve Bank of India. It can borrow money with the prior approval of the Central Government. Its functions range from planning, promotion, organisation or implementation of programmes for the development of petroleum resources to production and sale of petroleum products it produces. It conducts geological surveys for the exploration of petroleum and undertakes drilling and prospecting operations. The Commission determines its own procedure by framing rules and its decisions are by majority vote. The Government can acquire lands for the purposes of the Commission under the provisions of the Land Acquisition Act,

11. *Vellukunnel v. Reserve Bank of India*, AIR 1962 SC 1371; *Peerless Gen. Finance & Inv. Co. Ltd. v. Reserve Bank of India*, (1992) 2 SCC 343; AIR 1992 SC 1033.

1894. The purposes connected with the Commission's work are deemed to be public purposes within the meaning of the aforesaid Act.

(iii) Damodar Valley Corporation (DVC)

The Damodar Valley Corporation was established under the Damodar Valley Corporation Act, 1948. Like other corporations, it is a body corporate having perpetual succession and a common seal. It can sue and be sued. The Board of Management consists of a Chairman and two members appointed by the Government of India in consultation with the Governments of the States of Bihar and West Bengal. The members are whole-time, salaried employees of the Corporation. The Government of India is empowered to remove any member for incapacity or abuse of position. It also appoints the Secretary and the Financial Advisor of the Corporation. Their pay and conditions of service are fixed by the regulations of the corporation, made by the Corporation with the approval of the Central Government.

The objects of this Corporation are to promote and operate irrigation schemes, water supply, drainage, generation of electricity and electrical energy, navigation, etc. in the river Damodar. The river is well known for its notorious propensities. Due to heavy flooding which causes widespread damage and destruction in the States of Bihar and West Bengal, one of the important objects of the Corporation is flood control. It is empowered to establish, maintain and operate laboratories, experimental institutions and research stations to achieve the above-mentioned objects. It helps in construction of dams, barrages, reservoirs, power houses, etc. It supplies water and electricity and can levy rates for it.

The Corporation is empowered to acquire, hold and dispose of property. It has its own funds deposited in the Reserve Bank of India. It can borrow money with the previous approval of the Government of India. It is liable to pay taxes on its income. It has a separate and independent existence and it is an autonomous body independent of the Central or the State Governments. There is no interference by the Government in the matter of execution of its programmes and day-to-day administration. Nevertheless, the Corporation is subject to overall control of the Central Government, Parliament and the State legislatures of Bihar and West Bengal. It has to send its annual reports to the Governments. They are placed on the tables of Parliament and the two State legislatures. Parliament and the State legislatures exercise their legislative control through debates, questions and resolutions. The Central Government may also give directions to the Corporation with regard to its policy. The accounts of the Corporation are to be audited in the manner prescribed

by the Auditor General of India. Any dispute between the Corporation and the three Governments associated with it has to be settled by an arbitrator appointed by the Chief Justice of India.

(iv) Life Insurance Corporation of India (LIC)

The Life Insurance Corporation of India was established under the Life Insurance Corporation Act, 1956. It shares certain common characteristics with the other corporations. It is a body corporate with perpetual succession and a common seal. It has power to acquire, hold and dispose of property. It can sue and be sued. The Corporation was established 'to carry on life insurance business' and given the privilege of carrying on this business to the exclusion of all other persons and institutions. The Act requires the Corporation to develop the business to the best advantage of the community. The Central Government may give directions in writing in the matters of policy involving public interest. The Corporation shall be guided by such directions. 95% of the profits are to be reserved for policy holders and the balance is to be utilised as the Central Government may decide.

The Corporation is an autonomous body as regards its day-to-day administration. It is free from ministerial control except as to the broad guidelines of policy.

(v) Road Transport Corporations (RTCs)

Various State Governments have established Road Transport Corporations for their respective States under the Road Transport Corporations Act, 1950, e.g. Gujarat State Road Transport Corporation. A Road Transport Corporation is managed by a Chief Executive Officer, a General Manager and a Chief Accountant appointed by the State Government concerned. The Central Government contributes the capital in part, while the remaining capital is to be borne by the State Government concerned in agreed proportions. The Corporations can raise capital by issuing non-transferable shares. The capital, the shares and the dividends are guaranteed by the Government. The Corporation is a legal entity independent of the State Government. It is a body corporate having perpetual succession and a common seal. It can sue and be sued in its own name. Its employees are not 'civil servants' within the meaning of Article 311 of the Constitution of India, though they are deemed to be 'public servants' within the meaning of Section 21 of the Indian Penal Code, 1872.

The primary function of the Corporation is to provide efficient, adequate, economical and a properly coordinated system of road transport services in the country. The State Government is empowered to issue

general instructions for the efficient performance of the functions of the Corporation. It manufactures, purchases, maintains and repairs rolling stock, appliance, plant and equipment. It can acquire, hold and dispose of property. It can borrow money subject to the approval of the State Government. The budget has to be approved by the State Government. Its accounts are to be audited by the government auditors. The Government is empowered to ask for the statements, accounts, returns and any other information. It can order inquiries into the affairs of the Corporation. It may take over any part of the undertaking in public interest or supersede the Corporation, if it appears that the Corporation is wholly unfit and unable to perform its functions. It can also be wound up by a specific order of the State Government made after the previous approval of the Central Government.

(vi) State Trading Corporation (STC)

State Trading Corporation of India is a Government company.¹² It is wholly owned by the Government and all the shares are held by the Central Government and two Secretaries of the Government of India.

The object of the corporation as laid down in the Memorandum of Association is to organise and undertake generally with the State trading countries as also other countries in commodities entrusted to it for such purposes by the Central Government from time to time the purchase, sale and transport of such commodities in India or anywhere else in the world. Since it is constituted under the Companies Act, 1956 all the provisions of the Act apply to it. It can be wound up by a competent court. Its functions are commercial in nature. It is neither a department nor an organ of the Government of India.

Like a statutory corporation, a government company can also be said to be "State" within the meaning of Article 12 of the Constitution. Similarly, like employees of a statutory corporation, employees of a government company also cannot be said to be civil servants under Part XIV of the Constitution.

6. RIGHTS AND DUTIES OF PUBLIC CORPORATIONS

(a) Status

As stated above, a public corporation possesses a separate and distinct corporate personality. It is a body corporate with perpetual succession and a common seal. It can sue and be sued in its own name. Public corporations have been recognised in the Constitution. It expressly provides that the State may carry on any trade, industry, business or

12. S. 617, Companies Act, 1956.

service either itself or through a corporation owned or controlled by it to the exclusion of citizens. The laws providing for State monopolies are also saved by the Constitution.¹³

(b) Rights

A public corporation is a legal entity and accordingly, like any other legal person, it can sue for the enforcement of its legal rights. It should not, however, be forgotten that it is not a natural person, but merely an artificial person, and, therefore, cannot be said to be a citizen within the meaning of the Citizenship Act, 1955. Therefore, a corporation cannot claim any fundamental right conferred by the Constitution only on citizens.¹⁴ All the same its shareholders, being citizens, can claim protection of those fundamental rights.¹⁵

An interesting question which arises is whether fundamental rights conferred by the Constitution on a person or a citizen can be enforced against a public corporation. The rights conferred by Part III of the Constitution can be enforced not only against the 'State' but also against all 'local or other authorities'.¹⁶ In *University of Madras v. Shantha Bai*¹⁷, a narrow view had been taken by the High Court of Madras and it was held that the fundamental rights cannot be enforced against a University. But in *Rajasthan State Electricity Board v. Mohan Lal*¹⁸, the Supreme Court took a liberal view and held that the Electricity Board fell within the category of 'other authorities' within the meaning of Article 12 of the Constitution and fundamental rights can be enforced against it. After the momentous pronouncement of the Supreme Court in *Sukhdev Singh v. Bhagatram*¹⁹, now it is well-settled that fundamental rights can be enforced against public corporations.

13. Arts. 19(6)(ii) and 305, Constitution of India.

14. Art. 19, Constitution of India; see also *S.T. Corpn. of India v. C.T.O.*, AIR 1963 SC 1811; *Indo-China Steam Navigation Co. v. Jagjit Singh*, AIR 1964 SC 1140; *Tata Engineering Co. v. State of Bihar*, AIR 1965 SC 40; *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295; *Amritsar Municipality v. State of Punjab*, (1969) 1 SCC 475; AIR 1969 SC 1100; *State of Gujarat v. Ambica Mills*, (1974) 4 SCC 656; AIR 1974 SC 1300.

15. *Barium Chemicals (supra)*; *R.C. Cooper v. Union of India*, (1970) 1 SCC 248; AIR 1970 SC 564; *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788; AIR 1973 SC 106; *Neptune Assurance Co. v. Union of India*, (1973) 1 SCC 310; AIR 1973 SC 602; *State of Gujarat v. Ambica Mills (supra)*; *Godhra Electricity Co. Ltd. v. State of Gujarat*, (1975) 1 SCC 199; AIR 1975 SC 32.

16. Art. 12, Constitution of India.

17. AIR 1954 Mad 67.

18. AIR 1967 SC 1857.

19. (1975) 1 SCC 421 (446-47); AIR 1975 SC 1331(1347-48) 1365. See also *Sirsi Municipality v. C.K. Francis*, (1973) 1 SCC 409; AIR 1973 SC 855; *R.D. Shetty*

(c) Powers

There is no doubt that a statutory corporation can do only those acts as are authorised by the statute creating it, and that powers of such corporation do not extend beyond it. A statutory corporation must act within the framework of its constitution. Its express provisions and necessary implications must at all events be observed scrupulously. If it fails to act in conformity with law, the action is *ultra vires* and invalid.

But it is equally well-settled that the doctrine of *ultra vires* in relation to the powers of a statutory corporation must be understood reasonably. "Whatever may fairly be regarded as incidental to, or consequent upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*."²⁰
(emphasis supplied)

(d) Duties

A statutory corporation being an instrumentality of the State must exercise its powers in just, fair and reasonable manner. Its approach must be beneficial to general public. It must act *bona fide*. Wide powers conferred on corporations are subject to inherent limitations that they should be exercised honestly and in good faith.²¹

(e) Lifting of veil

In the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. The court can look behind the veil to see the real face of the corporation. This can be done by the following methods:

- (i) Peeping behind the veil;
- (ii) Penetrating the veil;
- (iii) Extending the veil; and
- (iv) Ignoring the veil.²²

7. LIABILITIES OF PUBLIC CORPORATIONS**(a) Liability in contracts**

A public corporation can enter into contract and can sue and be sued for breach thereof. Since a public corporation is not a government de-

v. *International Airport Authority*, (1979) 3 SCC 489; AIR 1979 SC 1628. For detailed discussion see C.K. Thakker: *Administrative Law*, 1996.

20. *Khandoze v. Reserve Bank of India*, (1982) 2 SCC 7(19-20); AIR 1982 SC 917.

21. *Mahesh Chandra v. U.P. Financial Corpn.*, (1993) 2 SCC 279; AIR 1993 SC 935.

22. *State of U.P. v. Renuagar Power Co.*, (1988) 4 SCC 59; *New Horizons v. Union of India*, (1995) 1 SCC 478 (497); *Sterling Computers v. M & N Publications*, (1993) 1 SCC 445; *LIC v. CERC*, (1995) 5 SCC 482.

partment, the provisions of Article 299 of the Constitution of India do not apply to it and a contract entered into between a public corporation and a private individual need not satisfy the requirements laid down in Article 299.²³ Similarly, the requirement of a statutory notice under Section 80 of the Code of Civil Procedure, 1908 before filing a suit against the Government does not apply in case of a suit against a public corporation.

(b) Liability in torts

A public corporation is liable in tort like any other person. It will be liable for the tortious acts committed by its servants and employees 'to the same extent as a private employer of full age and capacity would have been'.²⁴ This principle was established in England in 1866²⁵, and has been adopted in India also. A public corporation cannot claim the immunity conferred on the Government under Article 300 of the Constitution. A corporation may be held liable for libel, deceit or malicious prosecution though it cannot be sued for tortious acts of a personal nature, such as assault, personal defamation, etc. Similarly, it can sue for tortious acts of any person, such as libel, slander, etc. Likewise, all defences available to a private individual in an action against him for tortious acts will also be available to a public corporation. But a statute creating a public corporation may confer some immunity on the corporation or on its servants or employees with regard to the acts committed by them in good faith in discharge of their duties. For example, Section 28 of the Oil and Natural Gas Commission Act, 1959 reads as under:

"No suit, prosecution or other legal proceedings shall lie against the Commission or any member or employee of the Commission for anything which is in good faith done or intended to be done in pursuance of this Act or of any rule or regulation made thereunder."

It is submitted that the immunity conferred on statutory corporations for tortious acts committed by its servants is unjustifiable and against the principle of equality before the law and equal protection of law guaranteed under the provisions of the Constitution of India. Jain and Jain²⁶ rightly state: "In the modern welfare State, when the State is entering into business activities of all kinds, the protection clause in the statutes establishing corporations seems to be incongruous and unjustified."

23. For detailed discussion, see Lecture X (supra); see also C.K. Takwani: *Civil Procedure*, 1997.

24. For detailed discussion about 'Tortious Liability', see Lecture X (supra).

25. *Mersey Dock Trustees v. Gibbs*, (1866) LR 1 HL 93.

26. *Principles of Administrative Law*, 1986, p. 1033.

However, for *ultra vires* act of a servant, the corporation cannot be held liable.²⁷

(c) Liability for crimes

A public corporation may also be held vicariously liable for offences committed by its servants in the course of employment²⁸ e.g. libel, fraud, nuisance, contempt of court, etc. Since, however, it is an artificial person, it cannot be held liable for any offence which can be committed only by a natural person; e.g. murder, hurt, bigamy, etc.

(d) Crown privilege

A public corporation is only 'a public authority with large powers but in no way comparable to a Government department' and therefore, the doctrine of 'Crown privilege' cannot be claimed by public corporations. In *Tamlin v. Hannaford*²⁹, Denning, L.J. (as he then was) observed:

"In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a Government department nor do its powers fall within the province of Government."

8. SERVANTS OF PUBLIC CORPORATIONS

(a) General

A corporation established by or under a statute possesses an independent legal personality and it is an entity different from the Union or the State Government. Employees of a corporation are appointed by a corporation and the terms and conditions of their services are regulated by the Rules and Regulations framed by the corporation.

(b) Whether civil servants ?

Since a public corporation is a separate and distinct legal entity from the Government, its employees and servants are not 'civil servants' and they cannot claim protection of Article 311 of the Constitution.³⁰

27. *Lakshmanaswami v. LIC*, AIR 1963 SC 1185.

28. For 'Vicarious Liability', see Lecture X (*supra*).

29. (1950) 1 KB 18 (24); (1949) 2 All ER 327.

30. *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722; AIR 1981 SC 487; *Som Prakash Rekhi v. Union of India*, (1981) 1 SCC 449; AIR 1981 SC 212; *U.P. Warehousing Corpn. v. Vijay Narayan*, (1980) 3 SCC 459; AIR 1980 SC 840; *Kalra v. Project*

Thus, an employee of the Oil and Natural Gas Commission, the Life Insurance Corporation of India, the Industrial Finance Corporation, the Hindustan Steel Ltd., the Hindustan Antibiotics Ltd., the State Transport Corporation, the State Bank of India, the Damodar Valley Corporation, the Hindustan Cables Ltd., the State Electricity Board, the Sindri Fertilisers and Chemicals Ltd., etc. cannot be said to be a 'civil servant'.

(c) Whether public servants ?

Sometimes, a statute creating a corporation may confer on its employees the status of public servants for certain purposes. For instance, Section 56 of the Damodar Valley Corporation Act, 1948 reads as under:

"All members, officers and servants of the Corporation, whether appointed by the Central Government or the Corporation shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act to be public servants within the meaning of Section 21 of the Indian Penal Code."

But by such provisions, the employees of a corporation will not become civil servants so as to be entitled to the protection of Article 311 of the Constitution of India.

Thus, a Chief Minister or a Minister, an employee of Road Transport Corporation, a chairman of the managing committee of the municipality, etc. may be said to be 'public servants' under Section 21 of the Indian Penal Code, but nevertheless, they are not civil servants within the meaning of Article 311 of the Constitution of India.

(d) Whether entitled to reinstatement ?

A question may arise as to the effect of breach or violation of the Rules and Regulations framed by a corporation. Suppose, the Rules have been framed by the Government under the parent Act or the Regulations have been made by the corporation and in violation of the Rules or Regulations; the services of an employee have been terminated by a corporation. Whether he would be entitled to a declaration that the order passed by the corporation is null and void and that he is continued in service or he would be entitled to claim damages only and has no right to claim reinstatement.

It is submitted that the law on the point was somewhat uncertain up to 1975 and there were conflicting decisions of the Supreme Court. How-

and Equipment Corpn., (1984) 3 SCC 316; AIR 1984 SC 1361; *Pyare Lal Sharma v. J&K Ind.*, (1989) 3 SCC 448; AIR 1989 SC 1854; *State Bank of India v. Vijay Kumar*, (1990) 4 SCC 481. See also C.K. Thakker: *Administrative Law*, 1996, pp. 554-67.

ever, now the law appears to have been well settled that employees of statutory corporations are entitled to reinstatement.

In the leading case of *Tewari v. District Board, Agra*³¹, the Supreme Court held that ordinarily, a contract of personal service cannot be specifically enforced by granting an order of reinstatement. However, in the following circumstances, a contract of personal service can be enforced and an order of reinstatement can be granted by a competent court—

- (1) cases of civil servants falling under Article 311 of the Constitution of India;
- (2) cases falling under the Industrial Law; and
- (3) cases where acts of statutory bodies are in breach of mandatory obligation imposed by a statute.

Thus, in *L.I.C. v. Sunil Kumar*³², services of Field Officers were terminated without complying with the provisions of Life Insurance Corporation Field Officers (Alteration of Remuneration and other Terms and Conditions of Service) Order, 1957, since the orders terminating the services had not been passed in accordance with the Order, they were held invalid.

Unfortunately, however, a distinction was sought to be made between the Rules and Regulations by the Supreme Court in the case of *U.P. State Warehousing Corpn. v. C.K. Tyagi*³³. In that case, a confirmed employee was dismissed from service after holding an inquiry. He filed a suit challenging the order of dismissal, *inter alia*, on the ground that the inquiry was held in disregard of the Regulations framed by the corporation. The High Court granted reinstatement but the Supreme Court reversed the order of the High Court.

However, in *Sirsi Municipality v. Cecelia Francis*³⁴, an employee working in a municipal hospital run by the municipality was dismissed from service. She challenged the order of dismissal contending that it was in violation of Rule 143 framed under the Bombay District Municipalities Act, 1901. It was contended by the municipality that even if the dismissal was wrongful, the remedy was not declaration but damages. Negating the contention of the municipality, the Court held that 'where a State or public authority dismisses an employee in violation of man-

31. AIR 1964 SC 1680 (1682).

32. AIR 1964 SC 847; see also *Calcutta Dock Labour Board v. Jaffar Imam*, AIR 1966 SC 282; *Mafatlal Barot v. State Transport*, AIR 1966 SC 1364.

33. (1969) 2 SCC 838; AIR 1970 SC 1244; see also *Indian Airlines Corpn. v. Sukhdeo Rai*, (1971) 2 SCC 192; AIR 1971 SC 1828.

34. (1973) 1 SCC 409 (413); AIR 1973 SC 855 (857).

datory procedural requirements or on the grounds which are not sanctioned or supported by statute, the courts may exercise jurisdiction to declare the act of dismissal to be a nullity.

Then came the celebrated judgment in *Sukhdev Singh v. Bhagatram*³⁵. In that case, the dismissed employees of three statutory corporations, namely: (1) Oil and Natural Gas Commission, (2) Life Insurance Corporation, and (3) Industrial Finance Corporation claimed reinstatement. The Corporations were incorporated under the Oil and Natural Gas Commission Act, 1959, the Life Insurance Corporation Act, 1956, and the Industrial Finance Corporation Act, 1948.

One of the questions raised before the Supreme Court was whether the Regulations made by such corporations prescribing the terms and conditions of their employees have statutory force and if those Regulations have not been complied with, whether the employees were entitled to the relief of reinstatement.

Speaking for the majority, Ray, C.J. rightly observed: "There is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute.... An ordinary individual in a case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of statutory bodies. In the case of statutory bodies it has been said that the element of public employment or service and the support of statute require observance of rules and regulations.

*Failure to observe requirements by statutory bodies is enforced by courts by declaring dismissal in violation of rules and regulations to be void.*³⁶ (emphasis supplied)

(e) Principles

The following principles have been deduced by an eminent author on Constitutional Law³⁷ with regard to the status of employees of a statutory corporation—

35. (1975) 1 SCC 421; AIR 1975 SC 1331.

36. *Id.* at pp. 438-39 (SCC); p. 1341 (AIR); see also *Workmen v. Hindustan Steel Ltd.*, 1984 Supp SCC 554; AIR 1985 SC 251; *K.C. Joshi v. Union of India*, (1985) 3 SCC 153; AIR 1985 SC 1046; *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156; AIR 1986 SC 1571.

37. Seervai: *Constitutional Law of India*, 1984, Vol. II, pp. 2578-79.

- (i) a statutory corporation has a separate and independent existence and is a different entity from the Union or the State Government with its own property and its own fund and the employees of the corporation do not hold civil post under the Union or the State;
- (ii) it makes little difference in this respect, whether the Union or the State holds the majority share of the Corporation and controls its administration by policy directives or otherwise;
- (iii) it also makes little difference if such a statutory Corporation imitates or adopts the Fundamental Rules to govern the service conditions of its employees;
- (iv) although the ownership, control and management of the statutory corporation may be, in fact, vested in the Union or the State, yet in the eye of law the corporation is its own master and is a separate entity and its employees do not hold any 'civil post under the Union or the State';
- (v) if, however, the State or the Union controls a post under a statutory corporation in such a manner that it can create or abolish the post or can regulate the conditions subject to which the post is or will be held and if the Union or the State pays the holder of the post out of its own funds, then although the post carries the name of an office of the statutory corporation, it may be a civil post under the State or the Union.

To these, two more may be added—

- (vi) even if the statute creating a public corporation confers on its employees the status of public servants for certain purposes, they cannot thereby become civil servants so as to attract the provisions of Article 311 of the Constitution;
- (vii) even though employees of a statutory corporation cannot claim protection of Article 311 of the Constitution, they hold statutory status and are entitled to declaration of being in employment if their services are terminated otherwise than in accordance with the statutory provisions.

9. CONTROLS OVER PUBLIC CORPORATIONS

The main purpose of establishing public corporations is to promote economic activity through autonomous bodies. In fact, these corporations have been granted very wide powers and there is no interference by any authority in exercise of these powers by the corporations. Yet, it is necessary that some control over these corporations should be there so that the powers conferred on such corporations may not be arbitrarily

exercised or abused, and it may not become the 'headless fourth organ' of the Government. The various controls may now be discussed:

(a) Judicial control

(i) General

Since a public corporation is a legal entity it can sue and be sued. It is a body corporate having perpetual succession and a common seal. Legal proceedings may be taken by or against a corporation in its corporate name. It is a distinct and separate entity from the Crown or the Government.³⁸ Jurisdiction of courts over a public corporation is the same as it is over any private or public company except that the powers of the former depend on the provisions of a special statute while the powers of a company are derived from the terms of its Memorandum of Association. In some statutes an express provision is made enabling a corporation to be sued. But even in the absence of such a provision, a corporation can be sued like any other person. In fact, when any statute refers to a 'person', it includes a corporation also.³⁹ Accordingly, a public corporation is liable for a breach of contract and also in tort for tortious acts of its servants like any other person. It is liable to pay income tax unless expressly exempted and cannot invoke the exemption granted to the State under Article 289 of the Constitution of India. It is bound by a statute. It cannot claim 'Crown privilege'.

(ii) Traditional view

According to the traditional theory, since a public corporation is created by a statute, it is required to exercise its powers within the four corners of the constituent statute. Therefore, if a corporation exceeds its authority, the action may be declared *ultra vires*. Similarly, if a company registered under the Companies Act, 1956 acts *de hors* the terms and conditions mentioned in the Memorandum of Association, the same principle will be applied.⁴⁰

There are, however, certain difficulties. The main difficulty is that most of the statutes which confer powers on public corporations are so widely worded that it is very difficult, if not impossible, to declare a particular act of the corporation to be *ultra vires*. Similarly, where duties

38. *S.L. Agarwal v. Hindustan Steel Ltd.*, (1969) 1 SCC 177; AIR 1970 SC 1150; *H.E.M. Union v. State of Bihar*, (1969) 1 SCC 765; AIR 1970 SC 82; *State of Bihar v. Union of India*, (1970) 1 SCC 67; AIR 1970 SC 1446.

39. S. 3(42), General Clauses Act, 1897.

40. *Lakshmanaswami v. LIC*, AIR 1963 SC 1185; *State of Punjab v. Raja Ram*, (1981) 2 SCC 66; AIR 1981 SC 1694.

are imposed by statutes, generally they are vague in nature and cannot be endorsed through courts.

Again, who would be able to move the court for the purpose of getting an act of a corporation declared as *ultra vires*. Generally, only an aggrieved person has *locus standi* to move the court for the purpose of getting appropriate relief. In case of a public corporation or a government company, who can move the court restraining the public corporation or a government company from acting *ultra vires*? Usually, substantial shareholding is by the Government or government officials and it is too much to expect a shareholder coming to the court of law in such cases against the corporation or company. Thus, *the judicial control through the doctrine of ultra vires cannot be said to be direct, adequate or effective*.

(iii) *Modern view*

Modern State is not merely a 'police State' performing 'law and order' functions, but has become a welfare State, which acts through statutory corporations and companies. Thus, corporations have become 'a third arm' of the Government. They perform functions which are otherwise to be performed by the Government. Being a creation of the State, a public corporation must be subject to the same constitutional limitations as the State itself. Again, statutory corporations as well as government companies are held to be 'other authorities' and, therefore, "State" within the meaning of Article 12 of the Constitution. In these circumstances, there is no reason why these corporations should not be subject to the same judicial control as the Government itself. As discussed in Lecture X (*supra*), statutory corporations are amenable to the writ jurisdiction of the Supreme Court under Article 32 and of High Courts under Article 226 of the Constitution.

(iv) *Illustrative cases*

So far as Indian courts are concerned, they have always adopted a liberal view and have interfered wherever justice required such interference. Thus, if an action of a public corporation is illegal, arbitrary or unreasonable, the court would quash and set it aside. Even in case of grant of largess, jobs, government contracts, issue of quotas and licences, etc. such corporations and companies have to act in accordance with law.⁴¹ In cases of acceptance of tenders, enhancement of rates of taxes and fees, irrational or discriminatory actions cannot be permitted. In cases of employees of such corporations and government companies, though

41. *R.D. Shetty v. International Airport Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628.

they are not 'civil servants' under Part XIV of the Constitution and, therefore, not entitled to protection under Article 311 thereof, the general principles of service jurisprudence are applied to those employees. Nevertheless, in 'unequal fights between giant public sector undertakings and petty employees' the courts have safeguarded the interests of employees.⁴² Again, the courts have also criticized the attitude of such corporations whenever they had adopted an attitude of 'typical private employer's unconcealed dislike and detestation'.⁴² Apart from enforcing statutory regulations and granting relief of declaration and reinstatement in service to employees of corporations, by invoking the provisions of equality clause enshrined under Articles 14 and 16 of the Constitution of India, the regulations framed by such corporations were also declared illegal, arbitrary and unconstitutional by the courts.⁴³ In *LIC of India v. CERC*⁴⁴ the Supreme Court held that in prescribing terms, conditions and rates of premium while issuing policy, the corporation must act reasonably and fairly. The eligibility conditions must be just and reasonable.

(v) *Powers and duties of courts*

It is true that public corporations must have liberty in framing their policies. If the decisions have been taken bona fide although not strictly in accordance with the norms laid down by courts, they have been upheld on the principle laid down by Justice Holmes that they must be allowed some freedom of "play in the joints".⁴⁵ It cannot, however, be overlooked that such power is not absolute or blanket. If it is shown that exercise of power is arbitrary, unjust or unfair, an instrumentality of State cannot contend that its action is in accordance with the "letter of the law". Whatever may be the activity of a corporation, it must be subject to rule of law and should meet the test of Article 14 of the Constitution. It is not only the power but the duty of a court of law to see that every action of an instrumentality of the State is informed by reason, guided by public interest and conforms to the Preamble, Fundamental Rights and Directive Principles of the Constitution.⁴⁶

42. *K.C. Joshi v. Union of India*, (1985) 3 SCC 153; AIR 1985 SC 1046.

43. *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156; AIR 1986 SC 1571; *Bharat Petroleum Management Staff Pensioners v. Bharat Petroleum Corpn.*, (1988) 3 SCC 33; AIR 1988 SC 1407; *Delhi Transport Corpn. v. Mazdoor Congress*, 1991 Supp (1) SCC 600; AIR 1991 SC 101.

44. (1995) 5 SCC 482.

45. *Sterling Computers v. M & N Publications (supra)*.

46. *Id.*; see also *Central Inland Water Transport Corpn. v. Ganguly*, (1986) 3 SCC 156; AIR 1986 SC 1571; *R.D. Shetty v. International Airport Authority*, (1979) 3 SCC 489; AIR 1979 SC 1628.

(vi) *Conclusions*

It is submitted that the following observations of Krishna Iyer, J. in *Fertilizer Corpn. Kamgar Union v. Union of India*⁴⁷, lay down correct law on the point and therefore are worth quoting:

“Certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think that our internal management, business activity or institutional operation of public bodies can be subjected to inspection by the court. To do so, is incompetent and improper and, therefore, out of bounds, nevertheless, *the broad parameters of fairness in administration, bona fides in action, and the fundamental rules of reasonable management of public business, if breached, will become justiciable.*”⁴⁸

(emphasis supplied)

(b) *Governmental control*

(i) *General*

As the judicial control over public corporations is not effective, it needs to be supplemented by other controls. Government also exercises some control and supervision over such corporations as the custodian of public interest in different ways.

(ii) *Appointment and removal of members*

Generally, the power of appointment and removal of the Chairman and the members of a public corporation is vested in the Government.⁴⁹ This is the key provision and the most effective means of control over a public corporation. In some cases, the term of office of a member is also left to be determined by the Government.⁵⁰ In some statutes, a provision is made for removal of a member on the ground that the member is absent from meetings for a specified period, he is adjudged a bankrupt or is ‘otherwise unsuitable’ to continue as a member.⁵¹

(iii) *Finance*

The Government exercises effective control over a public corporation when such corporation is dependent on the Government for finance. A statute may require previous approval of the Government for undertaking

47. (1981) 1 SCC 568: AIR 1981 SC 344.

48. *Id.* at pp. 588-89 (SCC): 356 (AIR).

49. S. 4, Damodar Valley Corporation Act, 1948.

50. S. 5, Air Corporations Act, 1953.

51. S. 51, Damodar Valley Corporation Act, 1948.

any capital expenditure exceeding a particular amount.⁵² It may also provide to submit to the Government its programme and budget for the next year and to submit the same in advance.⁵³ It may also impose a condition on the corporation to take consent of the Government before borrowing money or may insist for issuance of bonds and debentures to secure payment made by the Government to the corporation.⁵⁴ The Comptroller and Auditor General exercises control in the matter of audit of accounts submitted by public corporations.⁵⁵

(iv) *Directives*

An important technique involved to reconcile governmental control with the autonomy of the undertaking is to authorise the Government to issue directives to public undertakings on matters of 'policy' without interfering with the matters of day-to-day administration. A statute may empower the Government to issue such directives as it may think necessary on questions of policy affecting the manner in which a corporation may perform its functions. The corporation will give effect to such directives issued by the Government. A statute may also provide that in case 'any question arises whether a direction relates to matter of policy involving public interest, the decision of the Central Government thereon shall be final'.⁵⁶ It is very difficult to draw a dividing line between matters of 'policy' and 'day-to-day' working of a public corporation and by this method, the Government can exercise effective control over public corporations. But unfortunately, in practice, the Government hardly exercises its power to issue policy directives. Considering the provisions of Section 21 of the Life Insurance Corporation Act, 1956, the Chagla Commission⁵⁷ has rightly observed:

"In my opinion, it is most unfortunate that the wise and sound principle laid down in Section 21 has not been adhered to in the working of the Life Insurance Corporation."

(v) *Rules and Regulations*

Usually a constituent statute creating a corporation contains provisions to make rules and regulations. The provision empowers the Central Government to make rules 'to give effect to the provisions of the Act'.

52. S. 35, Air Corporations Act, 1953.

53. S. 26, Food Corporations Act, 1964.

54. S. 10, Air Corporations Act, 1953.

55. S. 15, Air Corporations Act, 1953; S. 619, Companies Act, 1956.

56. S. 21, Life Insurance Corporation Act, 1956; see also *Fertilizer Corpn. v. Workmen*, AIR 1970 SC 867.

57. Chagla Commission: *Report on the Life Insurance Corporation*, (1958).

The other provisions authorise the corporation 'with the prior approval of the Central Government' to make regulations 'not inconsistent with the Act and the Rules made thereunder' for enabling it to discharge its functions under the Act.⁵⁸ Thus, even in case of framing rules and regulations, the Government is having the upper hand. Regulations promulgated without previous approval of the Government cannot be said to be valid.⁵⁹ Again, in case of inconsistency between the rules and regulations, the rules would prevail and the regulations will have to give way to the extent of inconsistency with the rules made by the Central Government.⁶⁰

(vi) *Suggestions*

As Chagla Commission rightly observed, there must be compromise between the authority of a statutory corporation in the matters of day-to-day administration and the control which must be exercised by a welfare State over such corporation. The central problem is the reconciliation of these two basic concepts of autonomy and control. No hard and fast rule can be laid down and no uniform pattern can be suggested. The balance between autonomy and control varies from enterprise to enterprise as well as the organisational form of enterprise.⁶¹

(c) **Parliamentary control**

(i) *General*

Public corporations are created and owned by the State, financed from public funds and many a time they enjoy full or partial monopoly in the industry, trade or business concerned. They are expected to exercise their powers in the public interest. It is, therefore, necessary for Parliament to exercise some degree and mode of control and supervision over these corporations. The methods adopted to exercise such control are numerically four.

(ii) *Statutory provisions*

All public corporations are established by or under statutes passed by Parliament or State legislatures. The powers to be exercised by such corporations can be defined by them. If any corporation exceeds or abuses its powers, Parliament or the State legislature can supersede or even abolish the said corporation. Even though this type of control is not frequently employed, it is a salutary check on the arbitrary exercise of power by the corporation.

58. Ss. 31, 32, Oil and Natural Gas Commission Act, 1959.

59. *Karnakar v. State of Mysore*, AIR 1966 Mys 317.

60. *L.I.C. v. Sunil Kumar*, AIR 1964 SC 847; see also Lecture V (*supra*).

61. Jain and Jain: *Principles of Administrative Law*, 1986, p. 1005.

(iii) Questions

Through this traditional method, the members of Parliament put questions relating to the functions performed by public corporations to the Minister concerned. But this method has not proved to be very effective because of the authority of public corporations in their fields. As Garner states: "The House of Commons is not a meeting of the shareholders of a public corporation, nor are the Ministers of the Crown in the position of directors of corporation".⁶²

Accordingly, broad principles subject to which questions relating to these undertakings can be asked, have been laid down, namely, questions relating to policy, an act or omission on the part of a Minister, or a matter of public interest (even though seemingly pertaining to a matter of day-to-day administration or an individual case), are ordinarily admissible. Questions which clearly relate to day-to-day administration of the undertakings are normally not admissible.

(iv) Debates

A more significant and effective method of parliamentary control is a debate on the affairs of a public corporation. This may take place when the annual accounts and reports regarding the corporation are placed before Parliament for discussion in accordance with the provisions of the statute concerned. There is no general obligation on the part of all corporations to present their budget estimates to Parliament. Estimates Committee⁶³, therefore, recommended that corporations should prepare a performance and programme statement for the budget year together with the previous year's statement and it should be made available to Parliament at the time of the annual budget.

(v) Parliamentary Committees

This is the most effective form of parliamentary control and supervision over the affairs conducted by public corporations. Parliament is a busy body and it is not possible for it to go into details about the working of these corporations. Parliament has, therefore, constituted the Committee on Public Undertakings in 1964. The functions of the Committee are to examine the reports and accounts of the public undertakings, to examine the reports, if any, of the Comptroller and Auditor-General on the public corporations, to examine in the context of the autonomy and efficiency of the public corporations, whether their affairs are being man-

62. *Administrative Law*, 1989, p. 363.

63. Jain and Jain: *Principles of Administrative Law*, 1986, pp. 1013-15.

aged in accordance with sound business principles and prudent commercial practices.

The recommendations of the Committee are advisory and, therefore, not binding on the Government. Yet, by convention, they are regarded as the recommendations by Parliament itself, and the Government accepts those recommendations; and in case of non-acceptance of the recommendations of the Committee, the ministry concerned has to give reasons therefor.

(vi) *Conclusions*

No doubt, parliamentary control over the public corporations is "diffuse and haphazard"⁶⁴, yet it is the duty of Parliament to see that if a corporation is exercising too great a measure of freedom, it should be brought to heel.⁶⁵ The whole purpose of establishing an autonomous undertaking is to make it free, in its daily working from detailed scrutiny by members of Parliament. But since the functions carried on by these undertakings are of public concern and to be performed in public interest, Parliament cannot completely absolve itself of its controlling function. It is, therefore, necessary that leaving the matters relating to day-to-day administration to the corporations, there must be overall supervision in important policy matters by Parliament.⁶⁶

(d) *Control by public*

(i) *General*

In the ultimate analysis, public corporations are established for the public and they are required to conduct their affairs in the public interest. In the ultimate analysis, public enterprises are owned by the people and those who run them are accountable to the people. It is, therefore, necessary that in addition to judicial, parliamentary and governmental control, these corporations must take into account the public opinion also. There are two different means of representation of the 'consumer' or public interest.

(ii) *Consumer councils*

These are bodies established under the authority of the statute constituting the corporations concerned with the object of enabling "consumers" to ventilate their grievances, or make their views known to the

64. Per Chandrachud, C.J. in *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568 (580): AIR 1981 SC 344.

65. Garner: *Administrative Law*, 1989, p. 362.

66. *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568 (580): AIR 1981 SC 344.

corporations. The outstanding examples of consumer councils are to be found in the electricity and gas industries. The difficulty about these councils is that the members of the general public have neither the technical knowledge nor a keen interest in the affairs of certain consumer councils; e.g. Gas or Electricity Consumer Councils. These councils may make recommendations to their area boards, but there have been very few occasions when alterations of policy decisions have resulted. Garner states: 'It is by no means clear that Consumer Councils are really able to justify their continued existence in the administrative machinery of the gas and electricity industries'. Again, if a question of 'policy' is raised, the Consumer Councils are powerless. The friendly and close relations that often exist between an Area Board and its Consumer Council may, whilst desirable from many points of view, militate against any real improvements or modifications in policy being achieved. Again, as Garner suggests the Consumer Council must have a power to 'bark' as well as to 'bite'.⁶⁷

(iii) Membership

In other cases, Parliament has arranged for members of certain public corporations to be nominated by local authorities and other bodies interested in the functions of the particular corporation. Thus, members of Hospital Management Committees are appointed by the Regional Hospital Boards after consultation with local health authorities, executive councils and other officials, as required by the statute. Sometimes, such consultation is made mandatory. Some statutes also provide that certain members of a council must possess particular qualifications.

(iv) Consumers and courts

Due to rapid development of administrative law and consciousness of rights by vigilant citizens, there is a clear tendency on the part of the consumers to approach courts for the purpose of ventilating their grievances. More and more cases are coming before the courts by consumers in their individual capacity or through some organisation by way of public interest litigation. So far as public interest litigation is concerned, it is dealt with in Lecture IX. But the courts have granted appropriate relief even to individual consumers whenever justice required.⁶⁸

(v) Consumer Protection Act

With a view 'to provide for better protection of the interests of consumers and for that purpose to make a provision for the establishment

67. Garner: *Administrative Law*, 1989, pp. 364-68.

68. For detailed discussion and case-law, see C.K. Thakker: *Administrative Law*, 1996, pp. 581-85.

of Consumer Councils and other authorities for the settlement of consumers' disputes and for matters connected therewith', Parliament enacted the Consumer Protection Act, 1986.⁶⁹ The Act provides for establishment of consumer protection councils, and also sets up machinery for settlement of consumer disputes.

10. CONCLUSIONS

From the above discussion, it is clear that public corporations must be autonomous in their day-to-day working and there should be no interference by the Government in it. At the same time, the wide powers conferred on such corporations should not be abused or arbitrarily exercised and they should not become the 'fourth branch' of the Government. The discussion would be well concluded by quoting the following observations of a learned author on Administrative Law:⁷⁰

"The most disturbing problem in connection with public corporations; especially those responsible for the management of nationalised industries, is undoubtedly that of control and accountability. A powerful corporation, having great financial resources, employing many personnel and possessing monopolistic powers conferred by statute, should be answerable in some measure to the elected representatives of the nation and to the courts of law. In many cases this control seems tenuous and ineffective. On the other hand, any large-scale commercial enterprise must be allowed freedom to carry on research, to experiment, and even on occasion to make mistakes. Indeed, the justification for the constitutional device of the public corporation has been said to be so as to secure freedom from civil service (and particularly Treasury) controls, and from the influence of party politics. *It is one of the modern problems of public administration, how these conflicting objectives can be reconciled.*"⁷¹

(emphasis supplied)

69. Preamble to Consumer Protection Act, 1986. See also C.K. Thakker: *Administrative Law*, 1996, p. 585.

70. Garner: *Administrative Law*, 1989, pp. 370-71.

71. See also *R.D. Shetty v. International Airport Authority*, (1979) 3 SCC 489; AIR 1979 SC 1628; *Fertilizer Corpn. Kamgar Union v. Union of India*, (1981) 1 SCC 568; AIR 1981 SC 344.

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